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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1002

HEINRICH C. HORN,
Petitioner,

vs.

CIA DE NAVEGACION FRUCO S. A. and J. R. ATKINS, d/b/a
ALABAMA FRUIT AND PRODUCE CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

HEINRICH C. HORN, Petitioner,
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To the United States Court of Appeals for the Fifth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of Heinrich C. Horn, Petitioner, respectfully shows to this Honorable Court:

I.

EARLIER REPORTS.

A. This is a Petition to the United States Circuit Court of Appeals for the Fifth Circuit and specifically to its Opinion dated November 5, 1968. This Opinion is set out, in full, in Appendix A to this petition. This Opinion has not yet been reported.

B. The Court of Appeals Opinion of November 5, 1968, was preceded by that Court's Opinion of June 28, 1968. The Opinion of June 28, 1968, is set out in full in Appendix B to this Petition. The Opinion of June 28, 1968, has not been reported.

C. The Opinions of June 28, 1968 and November 5, 1968, result from cross appeals from an Opinion of the United States District Court for the Southern District of Alabama of September 14, 1964 and is reported in 233 F. Supp. at page 637. Said Opinion is set out, in full, in Appendix C to this Petition.

II.

JURISDICTION.

A. The date of the judgment sought to be reviewed is November 5, 1968, on which day it was entered.

B. The Opinion and judgment of November 5, 1968, is an Opinion resulting from cross-petitions for rehearing resulting from the opinion of the Court of Appeals of June 28, 1968.

C. This Honorable Court has jurisdiction under the terms of Section 1254 of Title 28, of the **United States Code.**

III.

QUESTIONS AT ISSUE.

As is set out more fully below, the controversies which are here presented arise out of the carriage of certain cargoes of bananas from Ecuador to Mobile, Alabama. The carriage of the bananas was in 1962 aboard the HEINZ HORN, owned by your Petitioner, while she was under charter to Cia de Navegacion Fruco (hereinafter referred to for convenience as "Fruco"), one of the respondents herein. Under the terms of said charter, the

HEINZ HORN performed a total of five voyages and the controversies involve cargo carried on the first and fourth of these voyages. (In addition, during the same time, the MARIE HORN, a sister ship of the HEINZ HORN, performed three voyages under the terms of a charter party with Fruco of substantially identical terms.)

The questions presented for review are as follows:

A. Was the Court below correct in concluding that Heinrich C. Horn (hereinafter referred to as "Horn"), Petitioner, failed to use due diligence to make the HEINZ HORN seaworthy at the start of the first voyage?

B. Was the Court below correct in concluding that Horn failed to carry his burden of proving an absence of causation between the unseaworthiness and the damage which resulted on the first voyage?

C. Was the Court below correct in concluding the faulty stowage, and the resulting loss of cargo, was the responsibility of Horn? Is the charterer, Fruco, not primarily liable?

D. Was the Court below correct in concluding there was no inherent vice or defect in the bananas carried on the fourth voyage of the HEINZ HORN?

E. Was the Appellate Court correct in reversing the District Court's conclusion that Horn is entitled to charter hire for the time the charterer placed the HEINZ HORN off hire after the first voyage?

IV.

STATUTES INVOLVED.

The case involves the Carriage of Goods by Sea Act, found in Title 46 of the **United States Code**, Sections 1300 to 1315. This Act is set out in full in Appendix D to this Petition.

It is thought that the Harter Act, found in Title 46 of the United States Code, Sections 190 through 195, is not actually involved in this case. However, as some comments refer to that Act; and as certain of the authorities cited by the Court below are dependent on that Act, it is set out in full in Appendix E to this Petition.

V.

STATEMENT OF THE CASE.

On April 30, 1962, Cia de Navegacion Fruco, S.A., entered into a charter of the HEINZ HORN, a German flag vessel, owned by Petitioner, using a New York Produce Exchange Charter Party. The charter contemplated the carriage of bananas from Ecuador to the Gulf Coast of the United States. The HEINZ HORN actually went on charter, under the terms of this charter, on the 3rd day of June, 1962, at Mayaguez, Puerto Rico.

Before leaving Mayaguez, the HEINZ HORN was surveyed by the German Lloyd's Society for her classification, and a new certification was issued dated June 3, 1962.

The HEINZ HORN (as is her sister ship, the MARIE HORN) is a small, two hold, refrigerated vessel, of 915 metric tons dead weight capacity, built in 1958 (four years before this controversy arose). She is capable of about 60 air changes per hour when the holds are empty, and of maintaining temperatures down to minus 20 degrees centigrade in all holds. Her refrig ration equipment is located in a refrigeration house between No. 1 and No. 2 holds, serving both of them. The method of distribution of the cold air consisted of forcing the air down through a canal to be distributed forward from the after bulkhead of the lower No. 1 hold and aft from the forward bulkhead of the No. 2 hold. The refrigerated air moved through the lower holds in opposite directions,

up into the tweendeck space and back to the bulkheads between the two holds where it was recooled or exhausted, as the case may be. The direction of the flow could be reversed and, on occasion, was.

There were distance thermometers located at different places in each hold which could be read in the engine room. In addition, there was a temperature gauge for reading the delivery air going into the holds; and two temperature gauges for reading redelivery air, coming out of the holds. These temperature gauges were regularly read (when the refrigeration was in operation) and the temperature readings were recorded both in a deck refrigeration log book, and in an engine room refrigeration log book. These readings and entries were made at least at hourly intervals during the carriage of bananas.

Furthermore, at least once each day, the pulp temperature of the bananas was taken. This was accomplished by a man going through the refrigeration house into the tweendeck space and the lower hold of each hold, immediately by the bulkhead between the two holds, which goes under the refrigeration house, and actually inserting a thermometer in a banana, and taking a reading after the temperature in the thermometer had been lowered to that of the pulp of the banana. These pulp temperatures were not recorded unless there was something unusual or out of the way about them, and there is no evidence to the effect that there was anything unusual about the pulp temperatures taken during the course of the voyage.

At the time the HEINZ HORN went on charter, her Master was Captain Horne (the Appellate Court spells this "Horn"; the similarity of name with Petitioner is coincidence); she had two mates, three licensed engineers and three junior engineers. The engineers operated the refrigeration machinery. Subject to the change noted

below, this was the officer situation on the vessel throughout the period of charter.

At the Canal Zone, en route to her first loading, the HEINZ HORN picked up a representative of respondents, Mr. Christian. Horne understood him to be a supercargo, and so carried him on the ship's articles. Subsequently respondents characterized him as an untrained observer. He remained aboard through the loading and the first voyage.

After the HEINZ HORN had loaded and was on her first voyage from Eucador to Mobile, Captain Horne became ill, and it was decided to take him off the ship, which was done at the Canal Zone. The voyage was completed from the Canal Zone to Mobile under the command of Mr. Schultz, who held a Captain's license. At Mobile, Captain Freytag met the vessel and took over the command. There is no evidence that the illness and subsequent absence of Captain Horne in any way contributed to the condition of the cargo as it was found on arrival in Mobile on June 21, 1962.

Before the HEINZ HORN arrived in Puerto Bolivar, she commenced pre-cooling her holds, and got them to about 42° F. According to the loading report submitted by Commercial Latino Americana, S. A., the shipper and stevedore, which acted for Fruco, loading started at 1950 on June 11; it stopped at 0230 of June 11 (this is probably a typographical error; we suspect this was June 12); and commenced again at 0835 of June 12 and continued thereafter until 0100 of June 13. Thus, more than half of the loading was done at night. According to this loading report, a total of 3,539 stems of bananas were loaded in No. 1 hold and 2,009 boxes of bananas were loaded in that hold; whereas, 11,366 boxes of bananas were loaded in No. 2 hold. This exhibit also discloses that the shipment was supervised by Mr. Turner, Manager; C. A. Margues, T., Chief Loading Officer; two selectors, two talleymen,

two weight checks, and one stowage supervisor. It further discloses, in detail, the location aboard the vessel in which the bananas were stowed by two gangs, totaling 100 men.

At the time of loading, bin boards, which had been in No. 2 hold were removed, although they were left in No. 1 hold. Mr. Schultz has said that he had had no experience with shipping bananas in boxes, though the vessel had often carried bananas in stems, and that the bin boards were removed (which ordinarily would separate the hold into smaller compartments) because this is the method customarily used by the charterer in carrying bananas in boxes as he was informed by Mr. Christian and the loading stevedores.

This is in line with the instructions given by the charterer in its letter of instruction of June 1, 1962, in which it is said:

> ". . . We have been loading these boxes in our own vessel, MARTHA ANNE, and our experience in carrying the fruit in boxes has been very good, therefore, you should have no difficulties providing you follow our instructions." (This letter, in full, is Appendix F to this Petition.)

The bananas were brought from the shore alongside the vessel in barges. From the barges, gangways were erected to the vessel; and on the vessel, into the holds. Men, carrying a box of bananas, would run up the gangway to the deck of the vessel, down a gangway into the hold, and stow the cargo. These were the 100 men in the employ of Latino Americana, the shipper and stevedore.

The HEINZ HORN sailed from Puerto Bolivar early on the morning of June 13, and except for the illness of Captain Horne, her voyage from Puerto Bolivar to Mobile was uneventful. The instructions of Fruco to de-gas the holds every six hours were followed. The HEINZ HORN

arrived in Mobile late on June 21 and discharging commenced at 8:00 on the morning of June 22, 1962.

The problem arose by reason of the cargo in the No. 2 hold. It is to be noted that all of the cargo in the No. 1 hold was accepted and sold. The cargo, in boxes (or cartons), in No. 2 were found to have a pulp temperature which, depending on the witness or the location of the banana, ranged from 56 to 62 degrees.

Mr. Schultz points out that in the boxes, packed before the boxes came aboard the vessel, there were ripe bananas in with green bananas.

The District Court found the HEINZ HORN seaworthy. It went on to conclude that the vessel failed to use due diligence to insure the safe carriage of the bananas in that the officers failed to cause the bananas to be stowed properly and failed to exercise due diligence in promptly pulling the air temperatures down and maintaining the delivery and return air temperature at the desired level. On these conclusions, the District Court allowed a recovery from Horn of $31,261.64 with interest.

In its decision of June 28, 1968, the Court of Appeals reversed the District Court's finding that the HEINZ HORN was seaworthy, finding that she was unseaworthy with respect to her crew, and, relying on this Honorable Court's decision in **May v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft,** 1933, 290 U. S. 333, and its own decision in **The Framlington Court,** 69 F. (2d) 300, concluded it was not necessary to show causal relation between the defect (unseaworthiness) and the loss, and stated the effects of the improper stowage have no bearing on petitioner's liability in view of this determination. In the Appellate Court's revised opinion of November 5, 1968, the Appellate Court further concluded that Horn has failed to carry its burden of proving an absence of causation between the unseaworthiness and the loss. It further

concludes the primary cause of damage on the first voyage was the improper stowage of the bananas; that the ship's officers were acting for Horn, the Owner, rather than Fruco, the Charterer, in regard to decisions made touching this stowage. It affirms the District Court's conclusion of liability of petitioner.

On May 15, 1962, Fruco entered into an agreement to charter the MARIE HORN, a sister ship of the HEINZ HORN, also under a New York Produce Exchange Charter Party. The charter party for the MARIE HORN did not differ in any material respect from that for the HEINZ HORN.

The HEINZ HORN continued operating under the charter with Fruco for a total of five voyages (voyage here referring to a trip from Ecuador to Mobile with a cargo of bananas) and the MARIE HORN operated for a total of three voyages.

The only other voyage, of those just mentioned, from which claim arose for ripe or turning bananas, was voyage four, of the HEINZ HORN. There was involved here a shipment of 8,170 stems of bananas, a substantial portion of which were loaded after dark, aboard the HEINZ HORN on or about September 2, 1962 at Guayaquil, another loading port a short distance from Puerto Barrios, in Ecuador.

As to this voyage, the controversy touching loading or stowage does not exist. Evidence from the ship is to the effect that on the 2nd and 3rd day out of Guayaquil, on the way to Mobile, inspections were made in the tween-deck and lower holds of the vessel, and a total of 335 stems of bananas were found to be ripe already, and were jettisoned in an effort to prevent the ripening of other fruit.

On the vessel's arrival in Mobile, Mr. Atkins claimed some 56% of the bananas were ripe or turning. The Master issued a bill of lading without exceptions. At the trial,

a loading report, prepared by Frutera Ecuatoriana another shipper and stevedore in Ecuador, acting for Fruco, was introduced over objection. These constitute the only evidence introduced as to the good condition of the cargo on loading.

On this voyage, the delivery air reached 52° within eight hours after the hatches were closed where it remained. In this regard, reference is made to the letter of instructions from Fruco to the Master of the HEINZ HORN of June 1, 1962, Appendix F.

Again the District Court found that the HEINZ HORN was seaworthy. It further found there was no proof of inherent defect, quality, or vice of the cargo. It concluded the HEINZ HORN failed to use due diligence to insure the safe carriage of the cargo in that the officers failed to cause the bananas to be stowed properly and promptly to pull the air temperature down and maintain a delivery and return air temperature at the desired level. It concluded that Horn was responsible for damage in the amount of $18,495.73, plus interest.

In its opinion of June 28, 1968, the Court of Appeals affirmed the District Court's finding that the HEINZ HORN was seaworthy; it also affirmed the Court's finding that there was no proof of inherent defect in the cargo; it concluded the District Court erred in finding an absence of diligence in the stowage of the bananas; it concluded that the refrigeration clause, incorporated in the charter party, prevented a recovery from Horn on this voyage, and reversed the District Court's award of damages against Horn.

In its revised opinion of November 5, 1968, the Court of Appeals affirms its earlier decision in all respects except this: by reason of the incorporation of the Carriage of Goods by Sea Act in the charter party under the terms of the U. S. Clause Paramount, Cogsa has the effect of eliminating the refrigeration clause as a defense available

to Horn. It thereupon affirms the recovery the District Court allowed against Horn for the fourth voyage.

Following the discharge of the HEINZ HORN in Mobile on June 22, 1962, no orders were given for the sailing of that vessel until June 29, 1962, or which were effective until June 29. During this time the HEINZ HORN was drydocked and was on her owner's time for a period of just over a day.

The charterer viewed the HEINZ HORN as having been off hire for the entire period between June 22 and June 29 and deducted $4,327.73 from the charter hire of the HEINZ HORN. The District Court, after allowing the charterer a credit of $674.44 for the period the HEINZ HORN was drydocked, allowed the owner of the HEINZ HORN recovery of $3,651.29, plus interest, for this failure to pay charter hire.

Thereafter, when the HEINZ HORN arrived in Puerto Bolivar for her second voyage, the charterer placed the HEINZ HORN off hire for two more days because the vessel didn't arrive in time for loading and cargo was not ready at the time it arrived, because of this delay. The amount deducted for charter hire for this period was $1,266.66 at the rate of $633.33 per day. As it was the charterer, and not the owner who decided when the HEINZ HORN was to sail from Mobile, the District Court also allowed recovery of this charter hire withheld, plus interest.

The Court of Appeals in both its opinion of June 28, 1968, and its revised opinion of November 5, 1968, reversed the District Court. It grounded its reversal on Clause 15 of the charter party stating that the charterer is not liable for payment of hire for time lost from "deficiency of men", and that the time lost resulted from the delay in disposing of the damaged bananas, which in turn had been damaged by reason of inadequacy of personnel.

VI.

ARGUMENT.

A. 1. There is no support for the conclusion of the Court of Appeals that a vessel is to be deemed unseaworthy at the start of the voyage unless the owner insure that adequate and competent personnel will remain on board throughout the voyage. Such a conclusion is in direct conflict with the decisions of this Honorable Court, **Cullen Fuel Co. v. Hedger Co.**, 290 U. S. 82 (1933), and the decisions of other courts, **The Steel Navigator**, 23 F. (2d) 590 (2nd Cir. 1928); **Erie & St. Lawrence Corp. v. Barnes-Ames Company**, 52 F. (2d) 217 (W. D. N. Y. 1931).

2. (a) The Court of Appeals in concluding that the District Court erred in finding the vessel seaworthy reversed that Court when there was substantial evidence supporting the District Court's conclusion. **McAllister v. United States**, 348 U. S. 19.

(b) The evidence supporting the District Court is as follows: At the time of breaking ground, the HEINZ HORN had a Master, Captain Horne, and two Mates; she had three Engineers; and three Junior Engineers. The Engineers had the actual responsibility for operating the refrigeration machinery.

It is true that Captain Horne left the vessel at the Canal Zone on the voyage from Bolivar to Mobile, by reason of illness. Neither of the Courts below found he was ill at the time the vessel broke ground. In fact, Mr. Schultz, the only person who testified in regard to Captain Horne's condition, said the following:

> Q. "When you were asked about what his condition was or what was wrong when he left the ship at the

Canal Zone, you said that you didn't know, that you were not a doctor to diagnose the condition. Did he suffer from any illness at the time the cargo was being loaded while the vessel was in Puerto Bolivar?

A. "In Bolivar he was very healthy, and we were pleased because he was so good, because he was sick on previous voyages, not that he had to lie in bed, but he didn't feel well. Sometimes he had stomach pains and so on. In Bolivar he was really fine, he could eat everything and drink everything and was walking along the deck and looked very well.

Q. "Then he must have gotten ill between Bolivar and the Canal Zone.

A. "On the way to the Canal Zone he became seriously ill."

That the HEINZ HORN sailed with a Master and two Mates is consistent with the requirement of the law of the German flag under which she sailed. Attached, as Appendix G to this Petition, is a letter from the German Consulate General dated July 22, 1968, to Lamorte, Burns & Co., Inc., stating the applicable German Code requires a Master and only two Mates for a vessel of the class of the HEINZ HORN, together with relevant portion of the Code referred to and our translation.

The charter party of the HEINZ HORN states:

> ". . . the vessel is intended to be employed in the banana trade between good and safe port Ecuador . . . and safe ports US Gulf and/or US Atlantic."

This is the actual contract for the employment of the vessel. Nothing in the contract of hire for the vessel calls for the carriage of bananas "in boxes". As noted in the testimony of Mr. Schultz and Captain Freytag, this same vessel with the same personnel has quite successfully carried bananas on voyages approximately twice the length of the voyage contemplated here.

Thus, and with specific reference to the numbered items found by the Appellate Court, page A-15, Appendix A, the HEINZ HORN, at the time she broke ground in Bolivar:

(1) Had aboard a Master in good health;

(2) Had a normal complement of a Master, two Mates, three Engineers, three Assistant Engineers, as required by the applicable German law;

(3) Had aboard officers who had successfully carried bananas on voyages for twice the length here contemplated;

(4) After the Master left the vessel at the Canal Zone, had aboard not only two Mates, but three Engineers, and three Junior Engineers;

(5) The acting Master not only had prior experience as Captain of a refrigerated vessel, but had successful experience in the carriage of bananas.

3. That the HEINZ HORN was, in fact, seaworthy is shown by the fact that she did carry an acceptable cargo of bananas in her No. 1 hold; the same refrigeration machinery serving both holds and operated by the same personnel. This acceptable outturn of bananas from hold No. 1, on voyage one, refutes any conclusion that inadequate personnel was the cause of ripening bananas in No. 2 hold.

Captain Freytag, who joined the vessel at the time she arrived in Mobile completing her first voyage, and was present at the time the hatches were opened, said repeatedly that there was no question about the acceptable condition of the cargo in No. 1 hold.

All the other witnesses called, including Fruco's surveyor, the representative of the United States Depart-

ment of Agriculture and Mr. Atkins' employee entrusted with unloading the cargo, testified only as to the unacceptable condition of the cargo in No. 2 hold. Mr. Atkins' employee in fact testified as to the acceptable condition of the fruit stowed in both boxes and stems in No. 1 hold.

The significance of this uncontradicted testimony is that the HEINZ HORN, on the same voyage, using the same machinery and the same personnel, outturned a good cargo of bananas from hold No. 1, and ripening bananas out of hold No. 2. If the same personnel operate the same machinery on two holds at the same time, only one of which outturns unacceptable bananas, there must have been some cause other than personnel or machinery which brought about the ripening bananas.

B. Was the court below correct in concluding that Horn has failed to carry his burden of proving an absence of causation between the unseaworthiness and the cargo damage which resulted on the first voyage?

On the question of on whom rests the burden of proof of the cause of the damage, the Courts of Appeals are in conflict. In **The Oritani**, 40 F. (2d) 522; affirmed by adopting the District Court's opinion, 54 F. (2d) 1075, the Third Circuit Court of Appeals has held that the cargo libelant has the burden of showing that the unseaworthy condition is the proximate cause of the loss (40 F. (2d) p. 529). In the instant case, the Court of Appeals has stated that the shipowner has failed to carry its burden of proving an absence of causation between the unseaworthiness and loss.

Proof touching causation (or the lack of it) arises out of this: the HEINZ HORN on the same voyage, using the same machinery and the same personnel, outturned a good cargo of bananas from hold No. 1, and ripening bananas out of hold No. 2.

It is to be noted that there is no evidence in the record that the cargo carried in the No. 1 hold on voyage one was other than acceptable, and this includes evidence from the charterer and from the consignee.

C. Was the Court below correct in concluding the faulty stowage and resulting loss of cargo, was the responsibility of Horn, the ship owner?

This conclusion is in conflict with the conclusion reached by the Third Circuit Court of Appeals in **The Thomas P. Beal**, 11 F. (2d) 49. It is in conflict with decisions of the Second Circuit Court of Appeals: **Bull v. New York & Porto Rico S. S. Co.**, 167 Fed. 792; **American Tobacco Co. v. The Katingo Hadjipatera**, 194 F. (2d) 449, modifying the District Courts' decision in 81 F. Supp. 438, certiorari denied, 343 U. S. 978; and with numerous District Court decisions in the Second Circuit. See, e. g., **The Santona**, 152 Fed. 516, **Isbrandtsen Co. v. George S. Boutwell**, 1958 A. M. C. 351. It is incompatible with this Honorable Court's decision in **Oxford Paper Co. v. The Nidarholm**, 1931, 282 U. S. 681.

It is true the Court of Appeals in its decision of November 5, 1968, states the rule to be:

> "The Captain occupies a dual role with regard to such decisions. He acts for the ship owner where his stowage decisions are made with regard to the seaworthiness and safety of the vessel; he acts for the cargo owner where his decisions do not affect the seaworthiness or safety of the vessel, but affect the safety of the cargo only."

Petitioner does not find fault with the statement of the rule as set out by the Court of Appeals; the problem arises by reason of the failure of the Court of Appeals to apply the rule in this situation in which the stowage

of the cargo was concerned with the safety of the cargo only. It is difficult to conceive of a factual situation in which the second portion of the rule, aptly stated by the Court of Appeals, would have application if it does not have application to the situation here presented.

Admittedly, in the absence of contract, the ship owner is responsible for the cargo. Here the obligation properly to stow is placed on the charterer under the terms of Clause 8 of the charter party which is set out as Appendix H to this petition. To Appendix G, we add quotations from the opinions of Lord Atkin, and Lord Porter in the decision reached by the House of Lords in **Canadian Transport Co., Ltd. v. Court Line, Ltd.**, House of Lords 1940, A. C. 934, 64, Lloyd's Law List Reports 57. Here the House of Lords unanimously concluded that Clause 8 in a charter party there under consideration, identical in terms to the one which was a part of the charter party in the instant case, made the charterers, not the owners, financially responsible for damage to cargo resulting from faulty stowage.

In essence, the authorities cited on page 19 of this petition reach the same conclusion, usually by the device, first introduced by Judge Hough in the **Santona**, supra, of making the Master or officers of the vessel, the representatives or agents of the charterer under the terms of Clause 8 or similar charter party provisions, when they are making decisions with regard to the loading or stowing of the cargo which decisions are concerned with the safety of the cargo.

The Court of Appeals has concluded Fruco may have recovery of its loss to Atkins over against the vessel (on the theory that cargo may libel the vessel *in rem*). We agree with the Appellate Court that Atkins, as cargo owner, may bring its action against the HEINZ HORN *in rem*. However, this does not take into consideration

the fact that Fruco, as charterer, is a party to this action and may also be liable to Atkins, and its liability can be primary where as Horn's liability is only secondary.

This situation existed in the **Katingo Hadjipatera,** 194 F. (2d) 449, affirming 81 F. Supp. 438, certiorari denied 343 U. S. 978. The Court of Appeals in the **Katingo Hadjipatera** states the facts are sufficiently stated in the Opinion of the trial judge and, with the exceptions noted in the Opinion on appeal, the evidence amply supports his findings. Among the findings, not disturbed on appeal, or on certiorari, are the following:

> "SHIPOWNER'S CLAIM OVER AGAINST CHARTERER. It is indisputable that the charterer not only undertook the burden of stowage under the charter party, but actually performed that duty throughout. While the master retained an absolute right to direct stowage, for which he is, vis-a-vis third parties, always ultimately responsible, it is equitable that as between the charterer and the ship, the charterer should bear the loss. **Pioneer Import Corp. v. The Lafcomo,** supra, 138 F. 2d 907; **The Thomas P. Beal** (3 CCA), 1926 A. M. C. 438, 11 F. (2d) 49; see **Oxford Paper Co. v. The Nidarholm,** 282 U. S. 681, 685, 686, 1931 A. M. C. 522 . . ."

The Fifth Circuit has recognized the import of this rule in **Compagnie de Navigation, etc. v. United Mondial Corp.,** 316 F. (2d) 163, 5 CCA, 1963. Here the cargo owner was allowed to recover from the vessel *in rem,* but the Court went on to say:

> "If this judicial peril is more than the owner wants to bear, he can by contract as between himself and the user (charterer) shift the risk to a secondary one. See **American Tobacco Co. v. SS KATINGO HADJIPATERA** (2 Cir., 1951), 194 F. 2d 449, 1951 A. M. C. 1933."

D. The Court of Appeals has affirmed the District Court's statement that "there was no proof of inherent defect, quality or vice of the bananas" saying the carrier must have shown some defect, quality or vice adhering to the particular bananas brought aboard.

The only evidence showing the condition of the bananas on loading is the clean bill of lading signed by the Master. In turn, petitioner has shown that a substantial portion of the bananas were loaded at night when the light was inadequate to determine their color or firmness; that the shipper did not cut a banana from each stem to determine its softness, as was usually done; that on the second and third day after sailing, the vessel found it necessary to jettison a total of 335 stems of bananas because they were ripening too fast; that the delivery air into the holds where the bananas were carried reached 52° within the eight hour period where it steadied and remained for the balance of the voyage. (52° Fahrenheit is the lowest temperature permitted under the terms of the instructions from Fruco to Horn; it was achieved in a minimum of time which could be anticipated.)

In these circumstances, the lower courts were in error in placing the burden upon Horn to prove that there existed an inherent vice or defect in the cargo. In so doing, the lower courts are in direct conflict with contrary conclusions reached by the courts of the Second Circuit Court of Appeals: **The Niel Maersk**, 91 F. (2d) 932, 1937 A. M. C. 975 (2 CCA), certiorari denied sub nom, **Bradley v. Niel Maersk**, 302 U. S. 753; **American Tobacco Co. v. Katingo Hadjipatera**, 81 F. Supp. 438 (S. D. N. Y., 1948), modified on other grounds, 194 F. (2d) 449 (2 CCA, 1951), certiorari denied sub nom **American Tobacco Co. v. Hadjipateras**, 343 U. S. 978 (1952); **Hecht, Levis & Kahn, Inc. v. SS President Buchanan**, 236 F. (2d) 627 (2 CCA, 1956).

In essence the rule as stated by the Second Circuit in the foregoing cases is to the effect that, if the deterioration of the goods may have resulted from an inherent defect, the shipper has the burden of proving their good condition upon delivery to the carrier and to sustain that burden he must present some evidence beyond a clean bill of lading since the bill of lading is evidence only of the apparent or external condition.

This rule has also been followed in the Ninth Circuit Court of Appeals. See **Albers Bros. Milling Co. v. Hauptman,** 95 F. (2d) 286 (9 CCA, 1938); **Daido Line v. Thomas P. Gonzalez Corp.,** 299 F. (2d) 669 (9 CCA, 1962).

The Fifth Circuit Court of Appeals in **Compagnie de Navigation, etc. v. Mondial United Corp.,** 316 F. (2d) 163 (5 CCA, 1963), acknowledges the application of the rule, at least with regard to the produce or similar natural commodities, when it says:

> "Where because of the perishable or intrinsic nature of the commodity, the internal condition is not adequately revealed by external appearances, cargo may have a considerable burden of going further to prove actual condition . . ."

District Courts within the Fifth Circuit have applied the rule. See **Badrena e. Hijo, Inc. v. SS Rio Iguazu,** 182 F. Supp. 885, 1960 A. M. C. 2028 (District Court, Eastern District of Louisiana, 1960); **The St. Cuthbert; West Indies Food Importing, Inc. v. Cohana Shipping Corp.,** 1966 A. M. C. 1637 (District Court, Southern District of Florida, 1966).

In the face of this authority, and despite the evidence strongly indicating the bananas were already ripening at the time they were loaded, the courts below have concluded that Horn must fail because he has not carried his burden of establishing inherent vice in the cargo loaded.

E. Was the Appellate Court correct in reversing the District Court's conclusion that Horn is entitled to charter hire for the time the charterer placed the HEINZ HORN off hire after the first voyage?

Agreeing with the District Court in this regard, the Appellate Court said:

> "There is no doubt that the charter party provided that the ship sail on orders of the charterer."

It was because the charterer did not order the HEINZ HORN to sail from Mobile until June 29, 1962, that the District Court allowed Horn recovery of the charter hire withheld for the intervening period (less the time of dry-docking, admittedly at Horn's expense), plus the two day off hire time at Puerto Bolivar.

Although the record is replete with evidence of discussions; possibly even recriminations; between the parties, it is completely barren of evidence supporting the finding of the Appellate Court that the time lost in Mobile resulted from the delay in disposing of the damaged bananas, the basis for the Appellate Court's reversal of the District Court.

The conclusion of the Appellate Court is, therefore, in direct conflict with **McAllister v. United States**, 1954, 348 U. S. 19.

CONCLUSION.

As the situation now exists, under the terms of the New York Produce Exchange Charter Party, a form of charter quite common in usage among the shipping community, should cargo damage result from faulty storage, the vessel's charterer will bear the loss if the proceedings are brought within the area of the Second Circuit Court of Appeals; should it be presented within the area of the

Fifth Circuit Court of Appeals, the loss will fall on the shipowner.

In cases in which the question of inherent vice of the cargo is raised, the shipper of the cargo must produce some proof of the good condition of the cargo on loading, other than a clean bill of lading in the Second and Ninth Circuits; in the Fifth Circuit, the loss occasioned by cargo with inherent vice will fall on the shipowner unless he is able to prove the existence of the vice at the time of loading, a proof which, in the ordinary course of events, is quite beyond the shipowner's ability.

These are questions of importance both to the shipping and the insurance communities who are entitled to the benefit of this Honorable Court's conclusion with regard to them.

It is therefore respectfully requested that the writ herein prayed for be granted.

Respectfully submitted,
HEINRICH C. HORN,

By .....
JOHN H. TAPPAN,
His Counsel.

APPENDIX A.

In the United States Court of Appeals
for the Fifth Circuit.

October Term, 1966.

No. 22167.

D. C. Docket Nos. Adm. 2958, 2976, 2984 and 2988.

Heinrich C. Horn, Claimant of the M/S HEINZ HORN,
Appellant-Appellee,

versus

Cia de Navegacion Fruco, S. A. and J. R. Atkins,
d/b/a Alabama Fruit and Produce Company,
Appellees-Appellants.

(And Reverse Title.)

Appeals From the United States District Court
for the Southern District of Alabama.

Before Rives, Gewin and Godbold, Circuit Judges.

Judgment on Rehearing.

It Is Ordered that the original opinion and judgment of this Court are withdrawn, and in other respects, the Petitions for Rehearing are Denied;

Upon further consideration, it is now here ordered and adjudged by this Court that the judgment of the District Court as to the charter hire awarded Horn for the two periods of inactivity prior to voyage No. 2 is reversed; and that in all other respects, the judgment is affirmed;

It is further ordered and adjudged that the appellant-appellee, Heinrich C. Horn, Claimant of the M/S Heinz Horn, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 5, 1968.

Court Costs:

Docketing cause, etc. $25.00

Issued as Mandate: Nov. 13, 1968.

A true copy

Test: Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth Circuit,
By Jackie Esposito,
Deputy, Nov. 13, 1968.

New Orleans, Louisiana.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 22167.

Heinrich C. Horn, Claimant of the
M/S HEINZ HORN,
Appellant-Appellee,

versus

Cia de Navegacion Fruco, S. A., and J. R. Atkins,
d/b/a Alabama Fruit and Produce Company,
Appellees-Appellants.

(And Reverse Title.)

Appeals From the United States District Court
For the Southern District of Alabama.

(November 5, 1968.)

Before Rives, Gewin and Godbold, Circuit Judges.

Rives, Circuit Judge: Upon petitions for rehearing filed by the respective parties, the original opinion and decision of this Court are withdrawn and changed so as to read as hereinafter set forth. In other respects the petitions for rehearing are denied.

Substitute Opinion and Decision.

All parties have appealed from the decree rendered in four consolidated admiralty cases.[1] These disputes arose from the time charters of two sister ships for the transport of bananas, and the subsequent delivery of some parts of the banana shipments in excessively ripened condition.

Cia de Navegacion Fruco, S. A. (Fruco) chartered from Heinrich C. Horn (Horn) two refrigerated vessels for the carriage of bananas between Ecuador and the Gulf Coast of the United States. The M/S HEINZ HORN was chartered April 30, 1962, under a time charter patterned after the New York Produce Exchange Charter Party.[2] A similar time charter was executed by the same parties, on May 15, 1962, affecting the M/S MARIE HORN. J. R. Atkins, president of Fruco, and its principal shareholder is guarantor for Fruco on both charters.

Two libels for cargo damage arose from two of the voyages under the HEINZ HORN charter, voyage No. 1 and voyage No. 4. That vessel was delivered under charter to Fruco on June 3, 1962, at Mayaguez, Puerto Rico. She proceeded to Puerto Bolivar, Ecuador, to commence her initial voyage under the charter. En route to Puerto Bolivar, pursuant to Fruco's request, the vessel took on Daniel Christian, Fruco's representative, who was inexperienced in the banana trade and who was placed on board the HEINZ HORN to observe and to learn.

The vessel arrived in Puerto Bolivar June 10, 1962. Loading of bananas commenced June 11 and was completed early on June 13, under the supervision of Chief Mate Schultz. Apparently no cargo other than bananas

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[1] Cia de Navegacion Fruco S. A. v. M/S HEINZ HORN, et al., S. D. Ala. 1964, 233 F. Supp. 637.

[2] See Gilmore & Black, Admiralty, Appendix C, 802 (1957), (hereinafter cited as Gilmore & Black).

was loaded. The master of the vessel, Captain Rudolph Horn, signed two clean bills of lading for the cargo on June 12, 1962. Atkins, doing business as Alabama Fruit and Produce Company (Alabama Fruit), had previously furnished letters of credit covering this cargo and the sale was completed, f. o. b. Ecuador, on June 12, 1962.

The HEINZ HORN sailed from Puerto Bolivar early on the morning of June 13, directed toward Mobile, Alabama, with its cargo consigned to Alabama Fruit. Captain Horn left the ship at the Panama Canal due to illness; Chief Mate Schultz became acting master. He and the second mate were thereafter the only officers aboard; a normal complement of officers was a captain and three mates.

The vessel docked in Mobile on the night of June 21. When unloading commenced the next morning, many of the bananas were found to be ripe or ripening to such an extent that they were of no use to the importer. The greater damage was in the number two hold where the bananas had been packed in boxes. Damage was less severe in the number one hold, where the bananas had been stowed by the stem, as well as in boxes.

Under the terms of the charter party, the HEINZ HORN was to sail on the orders of Fruco, the charterer. Fruco did not issue a sail order to depart from Mobile until June 29. During the period between unloading of the cargo from voyage No. 1 and that re-sail date, the vessel went on dry dock for inspection for slightly more than one day; the dry-dock time admittedly was at the expense of Horn, as owner. Upon arrival in Puerto Bolivar for the second voyage, the HEINZ HORN stood by for two days awaiting bananas for loading. The vessel's delay in leaving Mobile occasioned the absence of any bananas ready for loading in Ecuador. Fruco has treated those two days, as well as the period after arrival in Mobile, as

being a period of off-charter, and it has declined to pay the charter hire for those times, amounting to a total of $5,594.39. Additionally, Fruco and Atkins, its guarantor, have withheld payment of charter hire in the amount of $25,946.76, as a result of Atkins' claim for bad cargo.

The events surrounding the second, third and fifth voyages of the HEINZ HORN under Fruco's charter produced no issue for this litigation.[3] Voyage No. 4 produced another delivery of excessively ripened bananas to Atkins, d/b/a Alabama Fruit. The HEINZ HORN was loaded with bananas at Guayaquil, Ecuador, on September 2 and 3, 1962. This shipment of bananas was loaded by the stem; none were in boxes. Both holds were utilized. The master of the vessel at that time, Captain Heinz Freytag, rejected a large number of bananas brought to the ship, on the ground that they were too far along in the ripening process to be shipped. Captain Freytag signed a clean bill of lading for 8,170 stems, consigned to Alabama Fruit, and the ship sailed the morning of September 3. En route to Mobile, some two days out from Guayaquil, the master jettisoned 335 stems of bananas, after inspecting the holds and finding these stems to be so far along in the ripening process as to "infect" the remainder of the cargo.

The HEINZ HORN docked in Mobile on September 11. Unloading commenced the following morning. Many stems of bananas were found to be too ripe to sell. The remaining bananas were sold at a reduced rate due to their ripened condition.

The HEINZ HORN made one further voyage under the charter with Fruco. On September 21, 1962, Alabama Fruit, through Atkins, notified Horn's agent that it felt

[3] However, see n. 11, infra, for the high percentage of ripe and turning bananas on those voyages.

"it best for you to take the ships back and cancel the charter at the end of the present voyage." In that letter, Atkins referred to a telephone conversation to that effect between himself and Horn's agent, purportedly held that same day. Subsequently, Fruco sent a confirmation telegram to the Horn agents.[4]

The MARIE HORN was redelivered to the owner on September 27; she had been chartered for a minimum period of four months, or until November 12, 1962. Thus her redelivery was some 46 days prior to the expiration of the minimum time. The HEINZ HORN charter was for a minimum three-month period, which expired September 3. Redelivery of that vessel to the owner was effected October 3. HEINZ HORN went on hire for another charter October 4. MARIE HORN had been booked September 3 for delivery to another charter October 1.

Libel was filed by Fruco, as charterer, against HEINZ HORN and Horn with regard to the first voyage. Atkins, d/b/a Alabama Fruit, subsequently joined in that libel. Atkins filed a similar libel against the same respondents with regard to voyage No. 4, to which Fruco was added by amendment as a party libelant. Horn filed two separate libels as owner of the HEINZ HORN and of the MARIE HORN, respectively, seeking charter hire alleg-

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[4] The telegram, charged to "Ala. Fruit & Produce Co.," reads as follows:

"IN ACCORDANCE WITH OUR PHONE CONVERSATION SEPTEMBER 21ST AND LETTER SAME DATE HAVE DEFINITELY DECIDED VESSELS MARIEHORN AND HEINZHORN NOT SUITABLE FOR TRADE INTENDED AS PER CHARTER PARTIES DATED MAY 15TH AND APRIL 30, 1962 RESPECTIVELY STOP MARIEHORN UNLOADED YESTERDAY EXCESSIVE RIPES WHICH SAME UNSATISFACTORY EXPERIENCE PREVIOUS CARGOES BOTH VESSELS THEREFORE ACCEPT THIS OUR INTENTION NOT TO USE THESE VESSELS FURTHER."

CIA DE NAVEGACION FRUCO SA"

edly due on each vessel. In connection with the first libel, filed as a result of voyage No. 1, the HEINZ HORN, after being put under seizure, was released under bond of $40,000.

The district court, after consolidation, awarded Atkins $31,261.64 for cargo damage resulting from voyage No. 1, and $18,495.73 for cargo damage with regard to voyage No. 4, or a total of $49,757.37. Horn was awarded a total amount of $30,864.71. This included $25,946.76 for charter hire withheld as security for cargo damage on voyage No. 1, $3,651.29 for charter hire for time HEINZ HORN was tied up in Mobile after voyage No. 1, and $1,266.66 for charter time due for the two days HEINZ HORN lay awaiting cargo in Puerto Bolivar prior to voyage No. 2. Interest of 6% per annum was granted on each award, to date from relevant dates. All parties have appealed. We affirm in part and reverse in part.

I.

The delicate nature of bananas necessitates special care in transportation. Bananas customarily are cut in a hard green state and are shipped under such refrigeration as will delay the ripening process. The ripening temperature for bananas is generally a pulp temperature of 60 to 62 degrees Fahrenheit. Banana shippers regard a transport temperature of 53 to 55 degrees Fahrenheit as appropriate. Temperatures below 52 degrees Fahrenheit have a deleterious chilling effect on the fruit. The general effort is to transport the bananas at a low temperature retarding the ripening process, but safely above the level at which the fruit is chilled.

The ripening process of the banana produces several effects on the fruit, including a color change from grass green to yellow and, ultimately, to brown. Ripening bananas exude, inter alia, ethylene gas and heat, both

of which tend to accelerate the ripening of other bananas in proximity. *See Lucayan Transports v. McCormick Shipping Corp.*, 5th Cir. 1951, 188 F. 2d 202, 204.

For all of these reasons, a ship properly equipped to transport bananas will provide stowage holds cooled by a refrigeration system which maintains a properly low temperature and which exhausts the heat and gases that encourage ripening.

Usually, prior to taking on a load of bananas, the carrier ship will cool its holds to an appropriate temperature. The cooling system may sometimes be operated during loading, even with the hatches open. Once loading is completed and the hatches are closed, the ship is expected to "pull down" the hold temperature and that of the bananas to the necessary level within approximately eight hours. The maintenance of the proper temperature thereafter depends on a close control of the temperature of air delivered into the hold, and of that exhausted. Delivery air normally should be at a level of 52 to 53 degrees. The temperature of the exhaust air apparently is controlled, in part, by the frequency with which the air in the hold is changed. A de-gassing process is used to ensure exhaust of the ripening gasses.

Maritime law infers a general warranty of seaworthiness from a charter-party agreement even where such warranty is not expressly made. *The Caledonia*, 1895, 157 U. S. 124; *Work v. Leathers*, 1878, 97 U. S. 379; *Jordan, Inc. v. Mayronne Drilling Mud Chemical & Engineering Service*, 5th Cir. 1954, 214 F. 2d 410. The term "seaworthiness" is read to mean, inter alia, fitness for the use anticipated. *See The Southwark*, 1903, 191 U. S. 1.

A similar warranty of seaworthiness at one time was read into contracts of carriage or bills of lading. The Carriage of Goods by Sea Act of 1936 (COGSA), 46

U. S. C., § 1300, *et seq.* abolished that general warranty with regard to the carrier-shipper relationship governed by bills of lading. Instead, the carrier is statutorily obligated to use due diligence to make the vessel seaworthy. 46 U. S. C., § 1303 (1). Such obligation is either met or not met when the vessel "breaks ground" on the voyage. *The Steel Navigator*, 2nd Cir. 1928, 23 F. 2d 590; *Erie & St. Lawrence Corp. v. Barnes-Ames Co.*, W. D. N. Y. 1931, 52 F. 2d 217.[5] No such statute regulates the terms of private charter parties, and risks of damage may be adjusted in any manner specified by the charter. *See The Monarch of Nassau*, 5th Cir. 1946, 155 F. 2d 48; Gilmore & Black, at 181.

As was the situation here, the owner and the charterer sometimes choose to incorporate COGSA into the charter party.[6] Such a practice serves to cut the general seaworthiness warranty "down to COGSA dimensions," that is, to the level of due diligence. Gilmore & Black, 182 n. 41, 183. *See Cooper v. Pinedo*, 5th Cir. 1954, 212 F. 2d 137; *Ore S. S. Corp. v. D/SA/S Hassel*, 2nd Cir. 1943, 137 F. 2d 326.

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[5] In part, at least COGSA is closely similar to the Harter Act of 1893, 46 U. S. C., §§ 190-196, so that cases interpreting the latter often have applicability to COGSA, Gilmore & Black, at 127. *See, e. g.*, The Bill, D. C. Md. 1942, 47 F. Supp. 969, aff'd 145 F. 2d 470. *But see* text following text at n. 12, *infra*.

[6] "44. New Jason Clause, New Both-to-Blame Collision Clause, Chamber of Shipping War Risk Clause 1 & 2, U. S. A. Clause Paramount, as attached, to be fully incorporated in this Charter Party.

. . . . . .

"U. S. Clause Paramount

"This Bill of Lading shall have effect, subject to the provisions of the Carriage of Goods by Sea Act of United States approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under the said Act. If any term of this Bill of Lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further."

The charter party in each case made specific reference to certain characteristics, specifications and capacities of the ships. The statements may reasonably be treated as warranties, the breach of which would entitle Fruco, as charterer, to avoid the agreement entirely or to sue for damages arising from the breach. *Davison v. Von Lingen*, 1885, 113 U. S. 40; *Romano v. West India Fruit & S. S. Co.*, 5th Cir. 1945, 151 F. 2d 727, 731; *Simonetti v. Foster*, D. Mass. 1880, 2 Fed. 415. We have found no authority which would indicate any limitation on obligations under such express representation through the advent of COGSA by incorporation. *Cf. Luckenbach v. McCahan Sugar Co.*, 1918, 248 U. S. 139, 149, 150. That question need not be decided here because, as presently developed, in this case the charterer stood in the same position as the cargo owner.

COGSA, in effect, limits the potential liability of the ship or its owner in the instant case. The recovery of Fruco, the charterer, from Horn or his ship is limited to the level of recovery which Fruco is found to owe the owner of the cargo, in this case Atkins, consignee and successor to the shipper. *See The Toledo*, 2nd Cir. 1941, 122 F. 2d 255, *aff'g, The Toledo*, E. D. N. Y. 1939, 30 F. Supp. 93, 98. Certainly Fruco should be allowed no recovery for loss it has not suffered, and its own potential loss is measured by that recovery which it may owe to Atkins.[7] Fruco's responsibility to Atkins is, in turn,

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[7] We thus avoid the broad question whether bills of lading generally are to be considered as contracts between shipper and time charterer, Benner Line v. Pendleton, 2nd Cir. 1914, 217 Fed. 497, 499; Burn Line v. United States & A. S. S. Co., 2nd Cir. 1908, 162 Fed. 298, 300; Jebsen v. A Cargo of Hemp, D. Mass. 1915, 228 Fed. 143, 148; British & Foreign Marine Ins. Co. v. Kilgour S. S. Co., S. D. N. Y. 1910, 184 Fed. 174, 178; or between shipper and owner, Field Line (Cardiff), Ltd. v. South Atlantic S. S. Line, 5th Cir. 1912, 201 Fed. 301, 304, citing Schooner Freeman v. Buckingham, 1855, 59 U. S. (18 How.) 182, 189. *See* Poor, *Charter Parties*, § 10 (4th ed.). The cases cited were not

established by the terms of the bills of lading. COGSA governs the relationship here created by that document, 46 U. S. C. A., § 1300, and the terms of COGSA may not be modified by agreement of the parties. 46 U. S. C. A., § 1305.

II.

VOYAGE NO. 1.

With regard to the first voyage of the HEINZ HORN the district court found:

> "The ripened state of the bananas was due to the high pulp temperatures at which they had been transported. The *primary cause* of the high pulp temperatures was the improper stowage of the boxes of bananas.
>
> "In the No. 2 hold the cartons of bananas were tightly stowed. No slots, bin boards or dunnage had been used to facilitate the flow of air between the cartons. The cartons were stowed an average of eight tiers high in both compartments of the No. 2 hold. No space was left between the cartons.
>
> "A *factor which contributed* to the ripening of the bananas was the excessive length of time taken in pulling down the temperature of the delivery and return air, and the failure of the vessel to maintain the proper hold temperature.
>
> "The bananas were packed in boxes or cardboard cartons designed for and used in the transporting of bananas. These cartons were well venti-

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dependent on a matter of statutory liability, and its effect on the relationships of the parties.

Since Horn has repeatedly asserted an absence of privity with Atkins, we are unable here to use the rationale of Cooper v. Pinedo, 5th Cir. 1954, 212 F. 2d 143, where we noted that counsel for both parties had understood that the issue of liability was to be determined from the original charter agreement.

lated and their construction in no way caused or contributed to the damage done to the bananas." 233 F. Supp. 637, 640 (emphasis supplied).

We agree with these determinations of the district court and find they are not clearly erroneous. *See* Fed. R. Civ. 52 (a).[8] Indeed, in the findings quoted above, the only matter over which there could be disagreement is with regard to the time taken to lower the hold temperatures, and the maintenance thereafter of the proper temperatures. Since a higher percentage of the bananas in hold No. 1 survived under the same refrigeration system, the method of stowage may have affected the ship's capacity to care for its cargo. We note, however, that Arthur Grant, a naval architect and marine surveyor, called by libelants[9] as an expert witness, testified at length as to his readings of the ship's temperature logs. He concluded that, with regard to hold No. 2, the delivery air temperature steadied down to 53 degrees Fahrenheit in approximately 36 hours, whereas an 8-hour period was the proper time. He stated further that the return air never steadied at or below 55 degrees Fahrenheit, while the appropriate level would have been between 53 and 54 degrees. Whether these effects resulted from the capacity of the system itself, or from the manner in which it was operated, he did not say. The district court concluded that the latter element, method of operation, was at fault. 233 F. Supp. at 642.

Our disagreement with the result reached in the district court as to voyage No. 1 stems from the path followed to its conclusion that liability for the "primary

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[8] See also McAllister v. United States, 1954, 348 U. S. 19; C. J. Dick Towing Co. v. The Leo, 5th Cir. 1953, 202 F. 2d 850, 854; River Terminals Corp. v. Southwestern Sugar & Molasses Co., 5th Cir. 1960, 274 F. 2d 36, 37.

[9] For convenience, we refer to Fruco and Atkins as libelants and to Horn as respondent.

cause" and contributing "factor" rests with Horn, as the "carrier."

From Atkins' view, the charterer and the owner are indistinguishable. It is not for Atkins to separate their responsibilities under the charter party, a document in which he did not participate except as a guarantor. However, Fruco may have recovery over against the vessel or its owner as a result of the charter-party terms. Thus we actually are concerned with Atkins' recovery through Fruco but ultimately against Horn.[10]

The district court concluded that the HEINZ HORN was seaworthy. We do not agree. While we would sustain its conclusion to the extent of the mechanical fitness of the vessel,[11] based on the testimony of the expert

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[10] This court has observed that, "regardless of whether libelants, as subcharterers, may claim privity of contract with the owners sufficient to maintain an action *in personam*, they are still entitled to maintain the present *in rem* suit against the vessel for damages to the cargo." Cooper v. Pinedo, 5th Cir. 1954, 212 F. 2d 137, 142; Perez v. Cia Tropical Exportadora, 5 Cir. 1950, 182 F. 2d 874, 875.

> The procedure we follow does no injustice to the shipowner. "The general owner must be taken to know that the purpose for which the vessel is hired, when not employed to carry cargo belonging to the hirer, is to carry cargo of third persons; and that bills of lading, or charter parties, must, in the invariable regular course of that business, be made, for the performance of which the law confers a lien on the vessel."

The Schooner Freeman, 1856, 59 U. S. (18 How.) 182, 190; Perez v. Cia Tropical Exportadora, 5th Cir. 1950, 182 F. 2d 874, 875.

[11] The testimony indicated that subsequent voyages of the HEINZ HORN under this charter party produced the following percentages of ripe and turning bananas:

No. 2	17.51%
No. 3	26.99%
No. 4	56.00%
No. 5	28.79%

The normal and expected percentage is from 3% to 5%. The testimony was that 10% is regarded as excessive. While the ac-

witnesses summoned by all parties, we conclude that the ship was unseaworthy with respect to its crew.

> "Seaworthiness is a relative term depending for its application upon the type of vessel and the character of the voyage. The general rule is that the ship must be staunch and strong and well equipped for the intended voyage. And she must also be provided with a crew, adequate in number and competent for the voyage with reference to its length and other particulars, and have a competent and skilled master of sound judgment and discretion."

The Framlington Court, 5th Cir. 1934, 69 F. 2d 300, 304.

From the record, the following is more than apparent:

(1) The Captain, Rudolph Horne was ill, did not supervise loading, and left the vessel before the end of the voyage.

(2) At no time during the voyage did the vessel have the normal complement of officers.

(3) The officers had no experience with boxed bananas.

(4) For officers, once the Captain left the ship at the Canal Zone, the vessel had only two mates, one of whom had limited sea experience.

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tual results could be regarded as indicative either of a condition of unseaworthiness or of failure to use due diligence to make the vessel seaworthy, as well as of failure properly to operate the refrigeration mechanism, the district court inferred the last explanation as the source of trouble, rather than the condition of the equipment.

The fact that Fruco's witness Grant testified that the HEINZ HORN'S refrigeration plant was overhauled after the fourth voyage, and that on the fifth voyage the delivery air stayed at 52 degrees "almost perfectly," does not necessarily lead to the conclusion that prior to that overhaul the owners had failed to use due diligence in providing a properly-equipped vessel. In fact, that overhaul apparently did not have a great effect on the comparatively high percentage of damaged bananas.

(5) The Acting Master had had prior experience as the Captain of a refrigerated vessel.

Faced with such evidence, we conclude that the HEINZ HORN was not seaworthy with regard to its personnel. The owner bore the burden of proving the exercise of due diligence to make the vessel seaworthy. *J. C. Penney Co. v. American Express Co.*, S. D. N. Y. 1952, 102 F. Supp. 742, *aff'd*, 2nd Cir. 1953, 201 F. 2d 846. Such proof does not appear in the record. We conclude, *Continental Insurance Co. v. United States*, 2nd Cir. 1952, 195 F. 2d 527, 528 that the owner failed to exercise due diligence to make the vessel seaworthy at the start of the voyage by not insuring that adequate and competent personnel would remain on board through the voyage. *International Nav. Co. v. Farr & Bailey Mfg. Co.*, 1901, 181 U. S. 218; *The Framlington Court, supra.*[12]

Under the Harter Act, *supra*, n. 5, the owner whose diligence in providing a seaworthy vessel is found deficient is liable for damage to cargo without causal relation between the defect and the disaster. *The Framlington Court, supra*, 69 F. 2d at 307. COGSA, however, calls for such causal relation as a prerequisite to a finding of liability. Although § 1303 (1) (a), *supra*, n. 12, makes the exercise of due diligence obligatory, § 1304 (1) n. 21, *infra*, has been construed as requiring that the loss be causally related to the want of due diligence before liability can be imposed on the carrier. *See The Vale Royal*, D. C. Md. 1943, 51 F. Supp. 412, 424; Gilmore & Black, at 130. This view is reinforced by reference to a comparison of COGSA with its predecessor:

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[12] § 1303: "(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy;

"(b) Properly man, equip, and supply the ship. . . ."

> "The principal difference between the Harter Act and the Hague Rules or Carriage of Goods by Sea Act is that the negligence or exception clause of the Harter Act—Section 3—is conditional; it never operates to exonerate the carrier unless due diligence has been used to make the ship seaworthy *in all respects*, regardless of causal connection; whereas the exception clause of the Act of 1936—Article 4 [§ 1304]—is positive; it always operates to exonerate the carrier unless due diligence has not been used in some respect proximately causing or contributing to the loss."

1 Benedict, Admiralty, § 96, at pp. 291-92 (Knauth ed.)

The manner in which the cooling system was operated stemmed from the unseaworthy character of the vessel. Whether the link of the causal chain is manifested by the numerical inadequacy of the crew, or in the want of proper training and instruction is not material, since the owner has failed to carry its burden of proving an absence of causation between the unseaworthiness and loss. *See Cooper v. Pinedo*, 5th Cir. 1954, 212 F. 2d 137, 143; *Eppens, Smith Co. v. Silver Line*, 5th Cir. 1942, 128 F. 2d 882, 883. We need not consider at this point any potential exculpation offered by the Refrigeration Clause quoted n. 15, *infra*, since that clause by its own terms is not operative where, as on this voyage, there was a want of due diligence to make the vessel seaworthy.

The other and primary cause of damage on the first voyage, as found by the district court, was the improper stowage of the bananas. 46 U. S. C., § 1303 provides in part:

> "(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

Neither the carrier nor the ship is responsible for loss resulting from a "cause arising without the actual fault or privity of the carrier and without the fault or neglect of the agents or servants of the carrier." § 1304 (2) (q).[13]

Horn, the owner, rather than denying the causal effect of the improper stowage of the bananas, has argued that Fruco, the charterer, was responsible for the stowage. We note that COGSA places stowage responsibility on the "carrier." We do not decide that, when COGSA is incorporated into a charter party, the term "carrier" in § 1303 (2) refers to the owner and not to the charterer, although such a use of the Act may well be proper. Instead, we regard COGSA, through its statutory control over the bills of lading herein, as momentarily placing stowage responsibility on Fruco, the "carrier" from the standpoint of the cargo, its shipper and its consignee. We then turn to the charter party to ascertain the party responsible for towage of the cargo under that document, as between the owner and the charterer.

The charter party placed all loading spaces and loading equipment at the disposal of the charterer. That person in turn was obligated to furnish the Captain with "all requisite instructions and sailing directions." Horn, the owner, accepted responsibility for "the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account." Clause 8 of the charter party places the Captain under the orders and directions

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[13] 1304 (2) (q): "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

. . . . . .

"(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

of the charterer "as regards employment and agency," but states that the charterer was to "load, stow, and trim the cargo at their expense, under the supervision of the Captain." We concluded that final decisions as to stowage were made subject to the discretion of the Captain, and were his responsibility.

The Captain occupies a dual role with regard to such decisions. He acts for the shipowner where his stowage decisions are made with regard to the seaworthiness and safety of the vessel; he acts for the cargo owner where his decisions do not affect the seaworthiness or safety of the vessel, but affect the safety of the cargo only. *Oxford Paper Co. v. The Nidarholm*, 1931, 282 U. S. 681; *Mobile, Miami & Gulf S. S. Co. v. Lake Giltedge S. S. Co.*, 5th Cir. 1934, 68 F. 2d 370; *The Thomas P. Beale*, 3rd Cir. 1926, 11 F. 2d 49, 53; *The Santona*, S. D. N. Y. 1907, 152 Fed. 516, 518.[14]

While the arrangement of the banana cartons affected the safety of their contents, it more pertinently affected the capacity of the ship to transport the delicate cargo

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[14] In *The Nidarholm*, the Supreme Court declined to adopt or reject an asserted distinction which would bar the shipowner's liability where cargo alone was imperiled. 282 U. S. at 684-85. *See* n. 1, *infra*. In Canadian Transport Co., Ltd. v. Count Line, Ltd., House of Lords 1940, A. C. 934 at 944, Lord Wright regarded the phrase "under the supervision of the Master" as an unnecessary expression of the pre-existing right of a vessel's master to limit the charterer's control of the stowage. "The master is responsible for the seaworthiness of the ship and also for insuring that the cargo will not be so loaded as to be subject to damage, by absence of dunnage and separation, by being placed near to other goods or to parts of the ship which are liable to cause damage, or in other ways. . . . [To] the extent that the master exercises supervision and limits the charterer's control of the stowage, the charterer's liability will be limited in a corresponding degree." We interpret that latter expression of the limitation on the liability of the charterer and the consequent imposition of liability on the vessel or its owner to be a process effected where there has been a difference of view between the master and the charterer. That situation was not present in the instant case.

in the manner specified by the charter party.[15] The capacity of the ship to perform the role assigned by the charter party is an aspect of the seaworthiness of the vessel. See *The Nidarholm*, supra, 282 U. S. at 685; *The Southwark, supra*, 191 U. S. at 8-12. Since the arrangement of the cartons in the hold critically affected the ship's carriage of the cargo in the specified and proper manner, decisions by and for the master with regard to the stowage of these cartons must be said to have been made on behalf of the ship's owner.[16]

We conclude that the Captain and his mate, in stowing these bananas too closely together, were acting for and in behalf of the ship's owner, although not to his best interest.

As a result of responsibility for the causes contributing to the loss of bananas on voyage No. 1, Horn is liable for all of the cargo damage arising from that voyage.

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[15] The Regulus, S. D. N. Y. 1883, 18 Fed. 380. Although the district court herein did not rule explicitly that the faulty stowage resulted in improper ventilation, and thus the capacity of the ship to cool the bananas, we have no doubt that such determination is implicit in, and, indeed, necessary to its findings.

[16] Compare Bull v. New York & Porto Rico S. S. Co., 2nd Cir. 1909, 167 Fed. 792; Isbrandtsen Co. v. The George S. Boutwell, S. D. N. Y. 1957, 1958 A. M. C. 351; Canadian Transport Co., Ltd. v. Count Line, Ltd., House of Lords, 1940, A. C. 934; where the master of the vessel was found to have acted solely in behalf of the charterer in stowing the cargo. In those cases the method of stowage had no effect on the ability of the vessel to provide the required mode of transportation; nothing was required but stowage space itself. In American Tobacco Co. v. The Katingo Hadjipatera, S. D. N. Y. 1948, 81 F. Supp. 438, *modified*, 2nd Cir. 1951, 194 F. 2d 449, where faulty stowage was found to have hindered ventilation of the cargo, the court held the charterer liable; the master, however, had no supervisory duties as to stowage, and, in any event, had protested, for the ship, to the stowage method used.

In this regard, we believe Bergan v. International Freighting Corp., 2nd Cir. 1958, 254 F. 2d 231, relied on by the district court, to be inapposite. That case considered questions of the employee-employer relationship for Jones Act purposes.

Damages.

The district court awarded damages to Atkins in the amount of $31,261.64 as a result of voyage No. 1. It considered conflicting testimony as to the actual quantities of ripened bananas, the extent of ripeness, and the market value of the various categories. We affirm the determination of the amount owed Atkins as a result of voyage No. 1.

III.

VOYAGE NO. 4.

On the fourth voyage under the HEINZ HORN'S charter, the bananas were loaded by the stem. The master for that voyage, Captain Heinz Freytag, stated on deposition that vertically-placed bin boards were used to separate the cargo to prevent it from shifting during the voyage. The district court concluded with respect to both of the voyages under consideration that "the officers failed to cause the bananas to be stowed properly." 233 F. Supp. at 642. While such apparently was the case on the first voyage, we find only slight evidence in the record to indicate that the manner of stowage employed on voyage No. 4 contributed to the ripening of that cargo of bananas. Most of the testimony adverse to the stowage technique employed referred to voyage No. 1.

Captain Freytag remarked in his deposition that the cargo on voyage No. 4 did not fill the holds. He stated that the resultant empty hold areas caused turbulence in the air circulation, making difficult the exhaust of foul air and gases. We pass any question of responsibility for the implied shortage of cargo and for the placement of the stems, for there is no testimony or evidence relating the "turbulence" to the damaged cargo.

The district court erred in finding an absence of due diligence in the stowage of the bananas on voyage No. 4.

Without that factor at issue, the dispute is as to whether the ripening of the cargo resulted from the operation of the cooling system or from the alleged ripened state of some of the cargo when it was loaded. Without evidence to indicate any decline in the condition of the refrigeration mechanism in the period between voyages No. 1 and No. 4, we again approve the district court's determination that the HEINZ HORN was mechanically seaworthy for the purpose of transporting bananas. No question of the adequacy of ship's personnel arises from this voyage.

Once it has been established that the bananas were loaded in good condition and unloaded in damaged condition, the carrier can avoid liability only by proving that the damage resulted from a cause for which it is statutorily not responsible, or that it exercised due diligence to prevent the harm. *Schnell* v. *The Vallescura*, 1934, 293 U. S. 296, 303; *Compagnie De Navigation v. Mondial United Corp.*, 5th Cir. 1963, 316 F. 2d 163, 169; *Schroeder Bros. Inc. v. The Saturnia*, 2nd Cir. 1955, 226 F. 2d 147, 149. The cargo was delivered to Mobile in part at least in an excessively ripened condition. Captain Freytag signed the bill of lading for this particular cargo, dated September 2, 1962. No exceptions were noted on the bill of lading. Thus is raised the rebuttable presumption that the fruit was delivered on board ship in good condition. *Fidelis Fisheries, Ltd.* v. *Thorden*, S. D. N. Y. 1956, 142 F. Supp. 798.

COGSA, at 46 U. S. C., § 1304 (2) (m), states:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from— . . . wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods . . ."

The fact that bananas require special care during shipment, due to such characteristics of that cargo as en-

courage ripening, *Lucayan Transports v. McCormick Shipping Corp., supra,* is not the circumstance envisioned by that exculpatory clause. Certainly all parties to the charter party understood the nature of such cargo in general and the special ship characteristics necessary for its transport. Rather, to gain assistance from that statutory exculpation, the carrier must have shown some defect, quality or vice adhering to the particular bananas brought aboard. *See Compagnie De Navigation v. Mondial United Corp., supra,* 316 F. 2d at 168-69.

The district court stated that "there was no proof of inherent defect, quality or vice of the bananas." 233 F. Supp. at 642. Captain Freytag and First Mate Schultz, in depositions, testified that they rejected as too ripe for shipment large quantities of the bananas brought to be loaded. Schultz stated further that Mr. Juan Rios was present as Atkins' representative at loading time and that Rios rejected many stems. Captain Freytag indicated that much of the rejection was based on color, and that the light available during night loading was not sufficient for the color test. Schultz indicated that the banana experts working on the loading operation, presumably including Rios, also had been cutting open selected bananas to examine for ripeness.

Captain Freytag took three stems of the rejected bananas and hung them on the deck during the voyage. He stated that a day out of port these stems were "ripe." He and Schultz inspected the holds and jettisoned bananas that were ripening too fast, 335 stems over a two-day period. Captain Freytag felt that these jettisoned bananas had been brought aboard at night, when they could not be inspected closely and hastened the ripening process of the other bananas.[17]

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[17] The bill of lading was dated September 2. Both Captain Freytag and Schultz testified that some loading was done in the pre-dawn hours of September 3.

With such testimony the only evidence available to prove the existence of an exculpatory condition of the cargo, we conclude that the district court was not clearly erroneous in finding no proof of inherent defect, quality, or vice in the bananas. The inferential and credibility determinations necessarily made by the district court will not be disturbed.

Since we disagree with the finding that stowage contributed to the cargo damage, and uphold the finding that the bananas themselves possessed no inherent conditions affecting their transport, our affirmance of the district court's determination that the vessel was seaworthy leads us to conclude that the manner of operation of the refrigeration system was the cause of the ripening of the cargo. This conclusion is not made merely for want of a better cause, for there is evidence in the record to support the district court's determination that the crew failed to use due diligence with regard to the pull-down time as well as with regard to the maintenance of proper temperatures.

Whereas eight hours was stated to be the allowable time within which the hold temperatures should reach the proper level once the hatches were closed, the evidence shows that the return air in hold No. 1 settled to the 55-degree level after forty hours[18] and that that in hold No. 2 reached the 55-degree level after forty-eight hours. The air being delivered into both holds generally steadied at an appropriate 52 degrees within the 8-hour period.

Clause 34 of the charter party required that a Refrigeration Clause be included in all bills of lading issued during the period of the charter. The Refrigeration Clause was

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[18] This exceeds by four hours the trial court's finding. 233 F. Supp. at 641.

also incorporated into the charter party itself.[19] That clause purports to bar liability of the shipowner or his ship for the negligent operation of the refrigeration equipment. If the clause is given effect, Horn and his ship cannot be held liable for damages resulting from the operation of the cooling system.[20]

We have observed, *supra*, that Fruco, the charterer, and one of the parties libellant here "should be allowed

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19 "34. Owners' usual refrigeration clause is incorporated in this Charter Party and is to be incorporated in all Bills of Lading and Mate's Receipts covering refrigerated cargo shipped by this vessel during the period covered by this Charter Party.

. . . . . .

"Refrigeration Clause

"It is also agreed that if the Shipowners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, said vessel, her Owners, Agents, or Officers shall in no case be responsible for any loss or damage to any cargo shipped in refrigerated chambers, whether such loss or damage arise from defect or insufficiency either before or after the shipment, in the Hull of the said vessel, or her Refrigeration Machinery, chambers space or apparatus, or any part thereof, or in any material used in the process of Refrigeration, and whether such loss or damage, however arising be caused by the negligence, fault, error in judgment of the Pilot, Master, Officers, Engineers, Mariners, Refrigeration Engineers of [sic] any other servants of the shipowners or persons for whom they are responsible or by unseaworthiness. It is expressly agreed that any negligence, fault, or error in the operation of the said Refrigeration apparatus shall be deemed to be and is hereby expressly agreed to be a fault of error in the management of the vessel within the meaning of this Bill of Lading, and shall not be considered or held to be a fault of failure in the custody, care or stowage of merchandise shipped in Refrigeration space."

20 However, Clause 12 stated:

> "That the Captain shall use diligence in caring for the proper ventilation and refrigeration of the cargo, also run temperature in accordance with Charterers' written instructions."

Nevertheless, the Refrigeration Clause was added specifically to the standard charter party form of which Clause 12 was a part. If there is a conflict between these portions, the Refrigeration Clause must here govern. *Cf.* Cooper v. Pinedo, *supra*, 212 F. 2d at 141-42.

no recovery for loss it has not suffered, and its own potential loss is measured by that recovery which it may owe Atkins," the consignee of the cargo. (See text at n. 7, *supra*.) We also noted *supra*, text at n. 10, the "we are actually concerned with Atkins' [the consignee's] recovery through Fruco [the charterer] but ultimately against Horn [the owner]." Thus, for there to be any recovery against Horn or his ship as a result of voyage No. 4, the effect of the Refrigeration Clause on the charter party relationship, as well as the effect on the bill of lading obligations must be assessed.

Considering first that clause and its potential interaction with the COGSA-governed bill of lading relationship, we turn to section 1304, which states that neither the carrier nor the ship is responsible for loss arising from neglect in the navigation or management of the ship.[21] The Refrigeration Clause expressly defined any fault in the operation of the refrigeration apparatus as a fault in the management of the ship.

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[21] § 1304: "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. . . ."

See § 1303 (2).

As observed *supra*, incorporation of COGSA into the charter party serves to limit liabilities under the charter to COGSA dimensions.

Section 1303 (2), it should be recalled, specifies that "the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

> "The cases which have defined the scope of the exemption from liability for negligence in the navigation and management of the ship have mostly been concerned with deciding whether a given fault is to be classified as of this sort or is to be regarded as one having to do with the custody, care, etc., of the cargo, for which the carrier is liable."

Gilmore & Black, at p. 134.

> "The distinction between a loss due to improper stowage or unseaworthiness on the one hand and a loss resulting from faults or errors in the navigation or the management of the vessel on the other hand requires in many instances a close and discriminating attention to the specific facts of the case."

1 Benedict, Admiralty, § 95, at pp. 288-89.

The same line is drawn both in the Harter Act and in COGSA, so that "the Harter Act cases are important . . . for the direct help they give in pinning down the distinction, in COGSA, between a Section 3 (2) [§ 1303 (2)] liability and a Section 4 (2) (a) [§ 1304 (2) (a)] immunity." Gilmore & Black at p. 134. The problem at this point is whether this court can accept the advance determination of the parties, via a clause necessarily a part of the bill of lading, that a particular act be placed on the immunity or the liability side of the statutory line.

In the general context of contractual definition of terms, this court once said:

> "It is often almost, if not quite, true that in contracts words mean what their users choose them to mean, neither more nor less, for it is true of most words that

> their shades of meaning are many, and that they take their color and content from the context and subject matter in connection with which they are used."

Cocke v. Vacuum Oil Co., 5th Cir. 1933, 63 F. 2d 406, 407. Such a reflection is not particularly helpful here, where the matter actually is not one of definition, but of categorization.

COGSA prohibits contractual limitation of the carrier's liability for negligence or liability imposed by the Act. 46 U. S. C. A. § 1303 (8). *See* 4 Williston, Contracts, § 1134B at p. 3237 (Williston & Thompson ed.). It follows that, if the manner in which the refrigeration equipment was operated on voyage No. 4 constituted acts and resulted in damages for which the carrier is statutorily liable to the cargo owner, the Refrigeration Clause cannot bar that liability.

Messrs. Gilmore and Black have set forth numerous cases demonstrating various performances falling on the liability or on the immunity side of the line. *See* Gilmore & Black, at p. 137 n. 54. Of the cases cited therein, those which have considered acts dealing with either ventilation or refrigeration of cargo have found such acts to be related to the duty of care owed the cargo, with liability for negligence related thereto imposed on the carrier. *See, e. g., Barr v. International Mercantile Marine Co.*, 2nd Cir. 1928, 29 F. 2d 26 (use of improper refrigerant); *The Rita Sister*, E. D. Pa. 1946, 69 F. Supp. 480 (improper ventilation of hold); *The Samland*, S. D. N. Y. 1925, 7 F. 2d 155 (failure to observe condition of thermometers in refrigerating compartments). *See also General Foods Corp. v. United States*, S. D. N. Y. 1952, 104 F. Supp. 629 (failure to ventilate vessel). Justice Holmes stated the following test: ". . . the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss." *The Germanic*, 1905, 196

U. S. 589, 598. *See also Leon Bernstein Co. v. Wilhelmsen,* 5th Cir. 1956, 232 F. 2d 771, 772. Since the operation of the refrigeration system herein so directly affected the condition of the cargo, we conclude that the damages related thereto fall within the liability created by §1303 (2). The Refrigeration Clause therefore cannot be allowed to bar liability for cargo damage so far as the bill of lading relationship between the cargo owner and the charterer is concerned. We do not hold, however that such a Refrigeration Clause can never have sway in the presence of COGSA, for there may be circumstances where the operation of a refrigeration system has more to do with the management or navigation of a vessel than with the care of the cargo.

The charter party incorporated COGSA. The parties must be presumed to have intended to incorporate all the effects of that statute. We therefore apply the reasoning set forth above and hold that the refrigeration clause does not bar the owner's liability under the charter party to "use due diligence in caring for the proper ventilation and refrigeration of the cargo" (charter party clause number 12), nor the liability assumed by the incorporation of COGSA.

We therefore affirm the judgment of the district court insofar as it awarded damages to Atkins as a result of loss of cargo on voyage No. 4.

IV.

CHARTER HIRE FOR PERIOD BETWEEN VOYAGES NO. 1 AND NO. 2.

In Mobile.

Fruco declined to pay $5,594.39 potentially due Horn for charter hire. Of that amount, $4,327.73 represented the

approximately seven-day period in Mobile, after unloading from the first voyage, when the ship lay without orders. Approximately one day of that period admittedly was at Horn's expense, for dry-dock inspection, to the amount of $676.44. There is no doubt that the charter party provided that the ship sail on orders of the charterer.

The district court found that "the assertions of Atkins that he rescinded the charter party at the end of voyage No. 1 are unsupported by the evidence." 233 F. Supp. 642.

Atkins testified that after he saw the cargo discharged on arrival from the first voyage, he spoke "a number of times" with Mr. Ulrich Mahn, a representative of the chartering agent. He stated that he told Mahn on June 22, the day of unloading, that the vessel was not suitable and was not properly crewed, and that it was his intention to place the HEINZ HORN off-hire. At another point in his testimony, Atkins stated that he told Mahn that the vessel would remain off-hire until it sailed, and that Mahn agreed. Mahn apparently reassured Atkins with promise of improved services. Atkins said that he agreed to "a trial basis, on a trip-by-trip basis." A letter from Atkins to Captain Freytag on June 25 referred to the second voyage to Puerto Bolivar as a "trial to see if the vessel can carry fruit satisfactorily." Copies of that letter went to Mahn and Mr. Jan Grisbolt, the chartering broker's representative. In response by letter of June 27, Captain Freytag stated that he was unable to agree with Atkins' letter of the 25th and that he, Freytag, had no authority or intent to change any term of the charter party. Mahn testified that he made no agreement with Atkins to the effect that the HEINZ HORN would operate on a trip-by-trip basis, rather than in accord with the charter.

Atkins has further argued that the charter parties were rescinded as a result of frustration of purpose. While the outturn of ripened bananas on subsequent voyages (*see* n.

11, *supra*) apparently was higher than normal, such had not occurred at the point at which Atkins says the charter party was frustrated.

The record supports the conclusion that the charter party was not rescinded at the conclusion of voyage No. 1. *Cf. Aaby v. States Marine Corp.*, 2nd Cir. 1950, 181 F. 2d 383.

Clause 15[22] provides that the charterer is not liable for payment of hire for time lost from "deficiency of men." We have seen already that the owner failed to exercise due diligence with respect to personnel aboard for the first voyage. The testimony shows that the time lost in Mobile, excepting the period of dry dock, resulted from the delay in disposing of the damaged bananas. The bananas were damaged, in part at least, as a result of inadequacy of personnel. The time lost in Mobile resulted from "deficiency of men."

In Puerto Bolivar.

Fruco and Atkins have explained that the HEINZ HORN was expected to turn around and return to Puerto Bolivar for the second voyage immediately after discharging its cargo in Mobile on June 22. The charterer then claims that the condition of the cargo, and its disposition, resulted in the delay in sailing until the 29th, and thus its failure to pick up the cargo scheduled for the second voyage. When the vessel did arrive in Puerto Bolivar, it had to wait two days before a substitute cargo was collected. The charterer withheld $1,266.66 in charter hire for those two days.

Since the time lost here again resulted from the time lost in disposing of bananas damaged on the first voyage,

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[22] "15. That in the event of the loss of time from deficiency of men or stores . . ., the payment of hire shall cease for the time thereby lost. . . ."

we conclude that the time lost was a result of the "deficiency of men," which resulted in the damage to the cargo.

We conclude that the district court was erroneous in awarding the sum of $4,917.95 in charter hire for these two periods.

V.

REDELIVERY OF THE VESSELS TO THE OWNER.

HEINZ HORN.

Fruco redelivered the HEINZ HORN to her owner October 3, 1962, a month past the minimum three-month period. She went on hire to another charterer on October 4.

Fruco claimed that it gave notice of delivery by letter of September 21, confirmed by telegram of September 27. Horn argues that whichever date was the effective date of notice, it was entitled to charter hire for thirty days from that date, as a result of a thirty-day notice requirement in the charter. The district court felt it unnecessary to pinpoint the date of notice, finding that Horn had been able to mitigate any potential damages for lack of use for the vessel by the immediate recharter.

The only testimony regarding the asserted mitigation of damages was from Mahn, the charter broker. His statements, self-serving though they may be, are not controverted by any evidence from Fruco. We might conclude from his testimony that under the subsequent charter the HEINZ HORN operated at an expense differential of $210.96 per day. Adding Horn's daily profit of $6.92, we could find that Horn is entitled to $217.88 per day for each day of the thirty-day period not allowed. Considering the testimony from another angle, we note that

the total hire earned on the subsequent charter was at a higher total rate than the monthly $19,000.00 paid by Fruco. The district court had opportunity to study the testimony in light of the witnesses' demeanor. With this in mind, we are unable to hold erroneous the finding of the court that the owner mitigated any alleged damages. Thus we do not consider the question of whether Horn actually was entitled to its thirty-day notice, or the question of the actual date on which notice of redelivery was made.

MARIE HORN.

The same letter and telegram applied to the MARIE HORN, which was chartered for a four-month minimum period, expiring November 12, 1962. Again, the only testimony as to damages here is from Horn's witness Mahn. The same sort of analysis was made for both vessels and we conclude, as with the HEINZ HORN, that the MARIE HORN mitigated any damages it otherwise might have suffered.

VI.

INTEREST ON THE JUDGMENTS.

The district court computed interest as follows:

> "Atkins is further entitled to interest at the rate of 6% per annum from June 22, 1962, on the cargo damage on Voyage No. 1, and from September 12, 1962, on the cargo damage on Voyage No. 4.
>
> "Horn is entitled to interest at the rate of 6% per annum from June 22, 1962, on the charter hire withheld as security for cargo damage on Voyage No. 1; from June 29, 1962, for the charter hire withheld for the time the HEINZ HORN was tied up in Mobile; and from July 8, 1962, for the

charter hire withheld for stand-by time in Bolivar." 233 F. Supp. at 643.

Horn argues on appeal that this method of computation, in effect, allows Atkins the benefit of the interest on the sum withheld as security as well as on the sum awarded. This plainly is not correct. We find no error in the assessment of interest.

VII.

The judgment is reversed as to the charter hire awarded Horn for the two periods of inactivity prior to Voyage No. 2. The judgment is affirmed in all other respects. Costs of appeal are taxed against Horn.

APPENDIX B.

In the
United States Court of Appeals
for the Fifth Circuit.

No. 22167.

Heinrich C. Horn, Claimant of the M/S HEINZ HORN,
Appellant-Appellee,

versus

Cia De Navegacion Fruco, S. A. and J. R. Atkins, d/b/a
Alabama Fruit and Produce Company,
Appellees-Appellants.

(and Reverse Title)

Appeals From the United States District Court for the
Southern District of Alabama.

(June 28, 1968.)

Before Rives, Gewin and Godbold, Circuit Judges.

Rives, Circuit Judge: All parties have appealed from the decree rendered in four consolidated admiralty cases.[1]

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[1] Cia de Navegacion Fruco, S. A. v. M/S HEINZ HORN, et al., S. D. Ala. 1964, 233 F. Supp. 637.

These disputes arose from the time charters of two sister ships for the transport of bananas, and the subsequent delivery of some parts of the banana shipments in excessively ripened condition.

Cia de Navegacion Fruco, S. A. (Fruco) chartered from Heinrich C. Horn (Horn) two refrigerated vessels for the carriage of bananas between Ecuador and the Gulf Coast of the United States. The M/S HEINZ HORN was chartered April 30, 1962, under a time charter patterned after the New York Produce Exchange Charter Party.[2] A similar time charter was executed by the same parties, on May 15, 1962, affecting the M/S MARIE HORN. J. R. Atkins, president of Fruco, and its principal shareholder, is guarantor for Fruco on both charters.

Two libels for cargo damage arose from two of the voyages under the HEINZ HORN charter, Voyage No. 1 and Voyage No. 4. That vessel was delivered under charter to Fruco on June 3, 1962, at Mayaguez, Puerto Rico. She proceeded to Puerto Bolivar, Ecuador, to commence her initial voyage under the charter. En route to Puerto Bolivar, pursuant to Fruco's request, the vessel took on Daniel Christian, Fruco's representative, who was inexperienced in the banana trade and who was placed on board the HEINZ HORN to observe and to learn.

The vessel arrived in Puerto Bolivar June 10, 1962. Loading of bananas commenced June 11 and was completed early on June 13, under the supervision of Chief Mate Schultz. Apparently no cargo other than bananas was loaded. The master of the vessel, Captain Rudolph Horn, signed two clean bills of lading for the cargo on June 12, 1962. Atkins, doing business as Alabama Fruit

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[2] *See* Gilmore & Black, Admiralty, Appendix C, 802 (1957), (hereinafter cited as Gilmore & Black).

and Produce Company (Alabama Fruit), had previously furnished letters of credit covering this cargo and the sale was completed, f. o. b. Ecuador, on June 12, 1962.

The HEINZ HORN sailed from Puerto Bolivar early on the morning of June 13, directed toward Mobile, Alabama, with its cargo consigned to Alabama Fruit. Captain Horn left the ship at the Panama Canal due to illness; Chief Mate Schultz became acting master. He and the second mate were thereafter the only officers aboard; a normal complement of officers was a captain and three mates.

The vessel docked in Mobile on the night of June 21. When unloading commenced the next morning, many of the bananas were found to be ripe or ripening to such an extent that they were of no use to the importer. The greater damage was in the number two hold where the bananas had been packed in boxes. Damage was less severe in the number one hold, where the bananas had been stowed by the stem as well as in boxes.

Under the terms of the charter party, the HEINZ HORN was to sail on the orders of Fruco, the charterer. Fruco did not issue a sail order to depart from Mobile until June 29. During the period between unloading of the cargo from voyage No. 1 and that re-sail date, the vessel went on dry dock for inspection for slightly more than one day; the dry-dock time admittedly was at the expense of Horn, as owner. Upon arrival in Puerto Bolivar for the second voyage, the HEINZ HORN stood by for two days awaiting bananas for loading. The vessel's delay in leaving Mobile occasioned the absence of any bananas ready for loading in Ecuador. Fruco has treated those two days, as well as the period after arrival in Mobile, as being a period of off-charter, and it has declined to pay the charter hire for those times, amounting to a total of $5,594.39. Additionally, Fruco and Atkins,

its guarantor, have withheld payment of charter hire in the amount of $25,946.76, as a result of Atkins' claim for bad cargo.

The events surrounding the second, third and fifth voyages of the HEINZ HORN under Fruco's charter produced no issue for this litigation.[3] Voyage No. 4 produced another delivery of excessively ripened bananas to Atkins, d/b/a Alabama Fruit. The HEINZ HORN was loaded with bananas at Guayaquil, Ecuador, on September 2 and 3, 1962. This shipment of bananas was loaded by the stem; none were in boxes. Both holds were utilized. The master of the vessel at that time, Captain Heinz Freytag, rejected a large number of bananas brought to the ship, on the ground that they were too far along in the ripening process to be shipped. Captain Freytag signed a clean bill of lading for 8,170 stems, consigned to Alabama Fruit, and the ship sailed the morning of September 3. En route to Mobile, some two days out from Guayaquil, the master jettisoned 335 stems of bananas, after inspecting the holds and finding these stems to be so far along in the ripening process as to "infect" the remainder of the cargo.

The HEINZ HORN docked in Mobile on September 11. Unloading commenced the following morning. Many stems of bananas were found to be too ripe to sell. The remaining bananas were sold at a reduced rate due to their ripened condition.

The HEINZ HORN made one further voyage under the charter with Fruco. On Septembe. 21, 1962, Alabama Fruit, through Atkins, notified Horn's agent that it felt "it best for you to take the ships back and cancel the charter at the end of the present voyage." In that letter, Atkins referred to a telephone conversation to that effect

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[3] However, see n. 11, *infra,* for the high percentage of ripe and turning bananas on those voyages.

between himself and Horn's agent, purportedly held that same day. Subsequently, Fruco sent a confirmation telegram to the Horn agents.[4]

The MARIE HORN was redelivered to the owner on September 27; she had been chartered for a minimum period of four months, or until November 12, 1962. Thus her redelivery was some 46 days prior to the expiration of the minimum time. The HEINZ HORN charter was for a minimum three-month period, which expired September 3. Redelivery of that vessel to the owner was effected October 3. HEINZ HORN went on hire for another charter October 4. MARIE HORN had been booked September 3 for delivery to another charterer October 1.

Libel was filed by Fruco, as charterer, against HEINZ HORN and Horn with regard to the first voyage. Atkins, d/b/a Alabama Fruit, subsequently joined in that libel. Atkins filed a similar libel against the same respondents with regard to voyage No. 4, to which Fruco was added by amendment as a party libelant. Horn filed two separate libels, as owner of the HEINZ HORN and of the MARIE HORN, respectively, seeking charter hire allegedly due on each vessel. In connection with the first libel, filed as a result of voyage No. 1, the HEINZ HORN,

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[4] The telegram, charged to "Ala. Fruit & Produce Co.," reads as follows:

"IN ACCORDANCE WITH OUR PHONE CONVERSATION SEPTEMBER 21ST AND LETTER SAME DATE HAVE DEFINITELY DECIDED VESSELS MARIEHORN AND HEINZHORN NOT SUITABLE FOR TRADE INTENDED AS PER CHARTER PARTIES DATED MAY 15TH AND APRIL 30, 1962 RESPECTIVELY STOP MARIEHORN UNLOADED YESTERDAY EXCESSIVE RIPES WHICH SAME UNSATISFACTORY EXPERIENCE PREVIOUS CARGOES BOTH VESSELS THEREFORE ACCEPT THIS OUR INTENTION NOT TO USE THESE VESSELS FURTHER.

CIA DE NAVEGACION FRUCO SA"

after being put under seizure, was released under bond of $40,000.00.

The district court, after consolidation, awarded Atkins $31,261.64 for cargo damage resulting from voyage No. 1, and $18,495.73 for cargo damage with regard to voyage No. 4, or a total of $49,757.37. Horn was awarded a total amount of $30,864.71. This included $25,946.76 for charter hire withheld as security for cargo damage on voyage No. 1, $3,651.29 for charter hire for time HEINZ HORN was tied up in Mobile after voyage No. 1, and $1,266.66 for charter time due for the two days HEINZ HORN lay awaiting cargo in Puerto Bolivar prior to voyage No. 2. Interest of 6% per annum was granted on each award, to date from relevant dates. All parties have appealed. We affirm in part and reverse in part.

I.

The delicate nature of bananas necessitates special care in transportation. Bananas customarily are cut in a hard green state and are shipped under such refrigeration as will delay the ripening process. The ripening temperature for bananas is generally a pulp temperature of 60 to 62 degrees Fahrenheit. Banana shippers regard a transport temperature of 53 to 55 degrees Fahrenheit as appropriate. Temperatures below 52 degrees Fahrenheit have a deleterious chilling effect on the fruit. The general effort is to transport the bananas at a low temperature, retarding the ripening process, but safely above the level at which the fruit is chilled.

The ripening process of the banana produces several effects on the fruit, including a color change from grass green to yellow and, ultimately, to brown. Ripening bananas exude, inter alia, ethylene gas and heat, both of which tend to accelerate the ripening of other bananas in

proximity. *See Lucayan Transports v. McCormick Shipping Corp.*, 5th Cir. 1951, 188 F. 2d 202, 204.

For all of these reasons, a ship properly equipped to transport bananas will provide stowage holds cooled by a refrigeration system which maintains a properly low temperature and which exhausts the heat and gases that encourage ripening.

Usually, prior to taking on a load of bananas, the carrier ship will cool its holds to an appropriate temperature. The cooling system may sometimes be operated during loading, even with the hatches open. Once loading is completed and the hatches are closed, the ship is expected to "pull down" the hold temperature and that of the bananas to the necessary level within approximately eight hours. The maintenance of the proper temperature thereafter depends on a close control of the temperature of air delivered into the hold, and of that exhausted. Delivery air normally should be at a level of 52 to 53 degrees. The temperature of the exhaust air apparently is controlled, in part, by the frequency with which the air in the hold is changed. A de-gassing process is used to ensure exhaust of the ripening gasses.

Maritime law infers a general warranty of seaworthiness from a charter-party agreement even where such warranty is not expressly made. *The Caledonia*, 1895, 157 U. S. 124; *Work v. Leathers*, 1878, 97 U. S. 379; *Jordan, Inc. v. Mayronne Drilling Mud, Chemical & Engineering Service*, 5th Cir. 1954, 214 F. 2d 410. The term "seaworthiness" is read to mean, inter alia, fitness for the use anticipated. *See The Southwark*, 1903, 191 U. S. 1.

A similar warranty of seaworthiness at one time was read into contracts of carriage or bills of lading. The Carriage of Goods by Sea Act of 1936 (COGSA), 46 U. S. C., § 1300, et seq., abolished that general warranty with regard to the carrier-shipper relationship governed by bills

of lading. Instead, the carrier is statutorily obligated to use due diligence to make the vessel seaworthy. 46 U. S. C., § 1303 (1). Such obligation is either met or not met when vessel "breaks ground" on the voyage. *The Steel Navigator,* 2nd Cir. 1928, 23 F. 2d 590; *Erie & St. Lawrence Corp. v. Barnes-Ames Co.,* W. D. N. Y. 1931, 52 F. 2d 217.[5] No such statute regulates the terms of private charter parties, and risks of damage may be adjusted in any manner specified by the charter. *See The Monarch of Nassau,* 5th Cir. 1946, 155 F. 2d 48; Gilmore & Black, at 181.

As was the situation here, the owner and the charterer sometimes choose to incorporate COGSA into the charter party.[6] Such a practice serves to cut the general seaworthiness warranty "down to COGSA dimensions," that is, to the level of due diligence. Gilmore & Black, 182 n. 41, 183. *See Cooper v. Pinedo,* 5th Cir. 1954, 212 F. 2d 137; *Ore S. S. Corp. v. D/SA/S Hassel,* 2nd Cir. 1943, 137 F. 2d 326.

The charter party in each case made specific reference to certain characteristics, specifications and capacities of

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[5] In part, at least, COGSA is closely similar to the Harter Act of 1893, 46 U. S. C., §§ 190-196, so that cases interpreting the latter may also be cited with respect to COGSA. Gilmore & Black, at 127.

[6] "44. New Jason Clause, New Both-to-Blame Collision Clause, Chamber of Shipping War Risk Clause 1 & 2, U. S. A. Clause Paramount, at attached, to be fully incorporated in this Charter Party.

. . . . . .

"U. S. Clause Paramount

"This Bill of Lading shall have effect, subject to the provisions of the Carriage of Goods by Sea Act of United States approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under the said Act. If any term of this Bill of Lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further."

the ships. The statements may reasonably be treated as warranties, the breach of which would entitle Fruco, as charterer, to avoid the agreement entirely or to sue for damages arising from the breach. *Davison v. Von Lingen,* 1885, 113 U. S. 40; *Romano v. West India Fruit & S. S. Co.,* 5th Cir., 1945, 151 F. 2d 727, 731; *Simonetti v. Foster,* D. Mass. 1880, 2 Fed. 415. We have found no authority which would indicate any limitation on obligations under such express representation through the advent of COGSA by incorporation. *Cf. Luckenbach v. McCahan Sugar Co.,* 1918, 248 U. S. 139, 149, 150. That question need not be decided here because, as presently developed, in this case the charterer stood in the same position as the cargo owner.

COGSA, in effect, limits the potential liability of the ship or its owner in the instant case. The recovery of Fruco, the charterer, from Horn or his ship is limited to the level of recovery which Fruco is found to owe the owner of the cargo, in this case Atkins, consignee and successor to the shipper. *See The Toledo,* 2nd Cir. 1941, 122 Fed. 255, *aff'g, The Toledo,* E. D. N. Y. 1939, 30 F. Supp. 93, 98. Certainly Fruco should be allowed no recovery for loss it has not suffered, and its own potential loss is measured by that recovery which it may owe to Atkins.[7]

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[7] We thus avoid the broad question whether bills of lading generally are to be considered as contracts between shipper and time charterer. Benner Line v. Pendleton, 2nd Cir. 1914, 217 Fed. 497, 499; Burn Line v. United States & A. S. S. Co., 2nd Cir. 1908, 162 Fed. 298, 300; Jebsen v. A Cargo of Hemp, D. Mass. 1915, 228 Fed. 143, 148; British & Foreign Marine Ins. Co. v. Kilgour S. S. Co., S. D. N. Y. 1910, 184 Fed. 174, 178; or between shipper and owner, Field Line (Cardiff), Ltd. v. South Atlantic S. S. Line, 5th Cir. 1912, 201 Fed. 301, 304, citing Schooner Freeman v. Buckingham, 1855, 59 U. S. (18 How.) 182, 189. *See* Poor, *Charter Parties,* § 10 (4th ed.). The cases cited were not dependent on a matter of statutory liability, and its effect on the relationships of the parties.

Since Horn has repeatedly asserted an absence of privity with Atkins, we are unable here to use the rationale of Cooper v.

Fruco's responsibility to Atkins is, in turn, established by the terms of the bills of lading. COGSA governs the relationship created by that document, and the terms of COGSA may not be modified by agreement of the parties. 46 U. S. C. A., § 1305.

II.

VOYAGE NO. 1.

With regard to the first voyage of the HEINZ HORN the district court found:

> "The ripened state of the bananas was due to the high pulp temperatures at which they had been transported. The *primary cause* of the high pulp temperatures was the improper stowage of the boxes of bananas.
>
> "In the No. 2 hold the cartons of bananas were tightly stowed. No slots, bin boards or dunnage had been used to facilitate the flow of air between the cartons. The cartons were stowed an average of eight tiers high in both compartments of the No. 2 hold. No space was left between the cartons.
>
> "A *factor which contributed* to the ripening of the bananas was the excessive length of time taken in pulling down the temperature of the delivery and return air, and the failure of the vessel to maintain the proper hold temperature.
>
> "The bananas were packed in boxes or cardboard cartons designed for and used in the transporting of bananas. These cartons were well ventilated and their construction in no way caused or contributed to the damage done to the bananas." 233 F. Supp. 637, 640 (emphasis supplied).

Pinedo, 5th Cir. 1954, 212 F. 2d 143, where we noted that counsel for both parties had understood that the issue of liability was to be determined from the original charter agreement.

We agree with these determinations of the district court and find they are not clearly erroneous. *See* Fed. R. Civ. P. 52 (a).[8] Indeed, in the findings quoted above, the only matter over which there could be disagreement is with regard to the time taken to lower the hold temperatures, and the maintenance thereafter of the proper temperatures. Since a higher percentage of the bananas in hold No. 1 survived under the same refrigeration system, the method of stowage may have affected the ship's capacity to care for its cargo. We note, however, that Arthur Grant, a naval architect and marine surveyor, called by libelants[9] as an expert witness, testified at length as to his readings of the ship's temperature logs. He concluded that, with regard to hold No. 2, the delivery air temperature steadied down to 53 degrees Fahrenheit in approximately 36 hours, whereas an 8-hour period was the proper time. He stated further that the return air never steadied at or below 55 degrees Fahrenheit, while the appropriate level would have been between 53 and 54 degrees. Whether these effects resulted from the capacity of the system itself, or from the manner in which it was operated, he did not say. The district court concluded that the latter element, method of operation was at fault. 233 F. Supp. at 642.

Our disagreement with the result reached in the district court as to voyage No. 1 stems from the path followed to its conclusion that liability for the "primary cause" and contributing "factor" rests with Horn, as the "carrier."

From Atkins' view, the charterer and the owner are indistinguishable. It is not for Atkins to separate their responsibilities under the charter party, a document in

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[8] See also McAllister v. United States, 1954, 348 U. S. 19; C. J. Dick Towing Co. v. The Leo, 5th Cir. 1953, 202 F. 2d 850, 854; River Terminals Corp. v. Southwestern Sugar & Molasses Co., 5th Cir. 1960, 274 F. 2d 36, 37.

[9] For convenience, we refer to Fruco and Atkins as libelants and to Horn as respondent.

which he did not participate except as a guarantor. However, Fruco may have recovery over against the vessel or its owner as a result of the charter-party terms. Thus we actually are concerned with Atkins' recovery through Fruco but ultimately against Horn.[10]

The district court concluded that the HEINZ HORN was seaworthy. We do not agree. While we would sustain its conclusion to the extent of the mechanical fitness of the vessel,[11] based on the testimony of the expert wit-

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[10] This court has observed that, "regardless of whether libelants, as subcharterers, may claim privity of contract with the owners sufficient to maintain an action *in personam*, they are still entitled to maintain the present *in rem* suit against the vessel for damages to the cargo." Cooper v. Pinedo, 5th Cir. 1954, 212 F. 2d 137, 142; Perez v. Cia Tropical Exportadora, 5th Cir. 1950, 182 F. 2d 874, 875.

The procedure we follow does no injustice to the shipowner.

> "The general owner must be taken to know that the purpose for which the vessel is hired, when not employed to carry cargo belonging to the hirer, is to carry cargo of third persons; and that bills of lading, or charter parties, must, in the invariable regular course of that business, be made, for the performance of which the law confers a lien on the vessel."

The Schooner Freeman, 1856, 59 U. S. (18 How.) 182, 190; Perez v. Cia Tropical Exportadora, 5th Cir. 1950, 182 F. 2d 874, 875.

[11] The testimony indicated that subsequent voyages of the HEINZ HORN under this charter party produced the following percentages of ripe and turning bananas:

No. 2	17.51%
No. 3	26.99%
No. 4	56.00%
No. 5	28.79%

The normal and expected percentage is from 3% to 5%. The testimony was that 10% per cent is regarded as excessive. While the actual results could be regarded as indicative either of a condition of unseaworthiness or of failure to use due diligence to make the vessel seaworthy, as well as of failure properly to operate the refrigeration mechanism, the district court inferred the last explanation as the source of trouble, rather than the condition of the equipment.

The fact that Fruco's witness Grant testified that the HEINZ HORN's refrigeration plant was overhauled after the fourth voy-

nesses summoned by all parties, we conclude that the ship was unseaworthy with respect to its crew.

> "Seaworthiness is a relative term depending for its application upon the type of vessel and the character of the voyage. The general rule is that the ship must be staunch and strong and well equipped for the intended voyage. And she must also be provided with a crew adequate in number and competent for the voyage with reference to its length and other particulars, and have a competent and skilled master of sound judgment and discretion."

The Framlington Court, 5th Cir. 1934, 69 F. 2d 300, 304. From the record, the following is more than apparent:

> (1) The Captain, Rudolph Horne, was ill, did not supervise loading, and left the vessel before the end of the voyage.
>
> (2) At no time during the voyage did the vessel have the normal complement of officers.
>
> (3) The officers had no experience with boxed bananas.
>
> (4) For officers, once the Captain left the ship at the Canal Zone, the vessel had only two mates, one of whom had limited sea experience.
>
> (5) The Acting Master had had prior experience as the Captain of a refrigerated vessel.

Faced with such evidence, we must conclude that the HEINZ HORN was not seaworthy with respect to its personnel. The owner failed to exercise due diligence to

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age, and that on the fifth voyage the delivery air stayed at 52 degrees "almost perfectly," does not necessarily lead to the conclusion that prior to that overhaul the owners had failed to use due diligence in providing a properly-equipped vessel. In fact, that overhaul apparently did not have a great effect on the comparatively high percentage of damaged bananas.

make the vessel seaworthy at the start of the voyage, by not insuring that adequate and competent personnel would remain on board through the voyage. *International Nav. Co. v. Farr & Bailey Mfg. Co.*, 1901, 181 U. S. 218; *The Framlington Court, supra.*[12]

Much has been said to this court regarding the responsibility for the stowage of the cargo. The effects of the improper stowage have no bearing on Horn's liability, in view of our determination of unseaworthiness. *May v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft*, 1933, 290 U. S. 333; *The Framlington Court, supra.* The same is true of any potential exculpation offered by the Refrigeration Clause, quoted *infra*, n. 15.

> "It is now settled that, when the owner relies upon an exception in a charter to escape liability for an accident resulting from errors of navigation, and is guilty of negligence in not making his vessel seaworthy, it is not necessary to show causal relation between the defect and the disaster."

The Fromlington Court, supra, 69 F. 2d at 307. Horn, therefore, is liable for all of the cargo damage arising from voyage No. 1.

Damages.

The district court awarded damages to Atkins in the amount of $31,261.64 as a result of voyage No. 1. It considered conflicting testimony as to the actual quantities of ripened bananas, the extent of ripeness, and the market value of the various categories. We affirm the determination of the amount owed Atkins as a result of voyage No. 1.

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[12] § 1303: "(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy;

"(b) Properly man, equip, and supply the ship. . . ."

III.

VOYAGE NO. 4.

On the fourth voyage under the HEINZ HORN'S charter, the bananas were loaded by the stem. The master for that voyage, Captain Heinz Freytag, stated on deposition that vertically-placed bin boards were used to separate the cargo to prevent it from shifting during the voyage. The district court concluded with respect to both of the voyages under consideration that "the officers failed to cause the bananas to be stowed properly." 233 F. Supp. at 642. While such apparently was the case on the first voyage, we find only slight evidence in the record to indicate that the manner of stowage employed on voyage No. 4 contributed to the ripening of that cargo of bananas. Most of the testimony adverse to the stowage technique employed referred to voyage No. 1.

Captain Freytag remarked in his deposition that the cargo on voyage No. 4 did not fill the holds. He stated that the resultant empty hold areas caused turbulence in the air circulation, making difficult the exhaust of foul air and gasses. We pass any question of responsibility for the implied shortage of cargo and for the placement of the stems, for there is no testimony or evidence relating the "turbulence" to the damaged cargo.

The district court erred in finding an absence of due diligence in the stowage of the bananas on voyage No. 4.

Without that factor at issue, the dispute is as to whether the ripening of the cargo resulted from the operation of the cooling system or from the alleged ripened state of some of the cargo when it was loaded. Without evidence to indicate any decline in the condition of the refrigeration mechanism in the period between voyages No. 1 and No. 4, we again approve the district court's

determination that the HEINZ HORN was mechanically seaworthy for the purpose of transporting bananas. No question of the adequacy of ship's personnel arises from this voyage.

Once it has been established that the bananas were loaded in good condition and unloaded in damaged condition, the carrier can avoid liability only by proving that the damage resulted from a cause for which it is statutorily not responsible, or that it exercised due diligence to prevent the harm. *Schnell v. The Vallescura,* 1934, 293 U. S. 296, 303; *Compagnie De Navigation v. Mondial United Corp.,* 5th Cir. 1963, 316 F. 2d 163, 169; *Schroeder Bros., Inc. v. The Saturnia,* 2nd Cir. 1955, 226 F. 2d 147, 149. The cargo was delivered to Mobile in part at least in an excessively ripened condition. Captain Freytag signed the bill of lading for this particular cargo, dated September 2, 1962. No exceptions were noted on the bill of lading. Thus is raised the rebuttable presumption that the fruit was delivered on board ship in good condition. *Fidelis Fisheries, Ltd. v. Thorden,* S. D. N. Y. 1956, 142 F. Supp. 798.

COGSA, at 46 U. S. C., § 1304 (2) (m), states:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—. . . wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods. . . .

The fact that bananas require special care during shipment, due to such characteristics of that cargo as encourage ripening, *Lucayan Transports v. McCormick Shipping Corp., supra,* is not the circumstance envisoned by that exculpatory clause. Certainly all parties to the charter party understood the nature of such cargo in general and the special ship characteristics necessary for its

transport. Rather, to gain assistance from that statutory exculpation, the carrier must have shown some defect, quality or vice adhering to the particular bananas brought aboard. *See Compagnie D. Navigation v. Mondial United Corp., supra,* 316 F. 2d at 168-69.

The district court stated that "there was no proof of inherent defect, quality or vice of the bananas." 233 F. Supp. at 642. Captain Freytag and First Mate Schultz, in depositions, testified that they rejected as too ripe for shipment large quantities of the bananas brought to be loaded. Schultz stated further that Mr. Juan Rios was present as Atkins' representative at loading time and that Rios rejected many stems. Captain Freytag indicated that much of the rejection was based on color, and that the light available during night loading was not sufficient for the color test. Schultz indicated that the banana experts working on the loading operation, presumably including Rios, also had been cutting open selected bananas to examine for ripeness.

Captain Freytag took three stems of the rejected bananas and hung them on the deck during the voyage. He stated that a day out of port these stems were "ripe". He and Schultz inspected the holds and jettisoned bananas that were ripening too fast, 335 stems over a two-day period. Captain Freytag felt that these jettisoned bananas had been brought aboard at night, when they could not be inspected closely, and hastened the ripening process of the other bananas.[13] This suspicion was controverted by Mr. Turner, the shipper.

With such testimony the only evidence available to prove the existence of an exculpatory condition of the

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[13] The bill of lading was dated September 2. Both Captain Freytag and Schultz testified that some loading was done in the pre-dawn hours of September 3.

cargo, we conclude that the district court was not clearly erroneous in finding no proof of inherent defect, quality, or vice in the bananas. The inferential and credibility determinations necessarily made by the district court will not be disturbed.

Since we disagree with the finding that stowage contributed to the cargo damage, and uphold the finding that the bananas themselves possessed no inherent conditions affecting their transport, our affirmance of the district court's determination that the vessel was seaworthy leads us to conclude that the manner of operation of the refrigeration system was the cause of the ripening of the cargo. This conclusion is not made merely for want of a better cause, for there is evidence in the record to support the district court's determination that the crew failed to use due diligence with regard to the pull-down time as well as with regard to the maintenance of proper temperatures.

Whereas eight hours was stated to be the allowable time within which the hold temperatures should reach the proper level once the hatches were closed, the evidence shows that the return air in hold No. 1 settled to the 55-degree level after forty hours[14] and that that in hold No. 2 reached the 55-degree level after forty-eight hours. The air being delivered into both holds generally steadied at an appropriate 52 degrees within the 8-hour period.

Clause 34 of the charter party required that the Refrigeration Clause be included in all bills of lading issued during the period of charter.[15] It was also incorporated

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[14] This exceeds by four hours the trial court's finding. 233 F. Supp. at 641.

[15] "34. Owners' usual refrigeration clause is incorporated in this Charter Party and is to be incorporated in all Bills of Lading

into the charter party itself. That clause bars liability of the shipowner or his ship for the negligent operation of the refrigeration equipment. Horn therefore cannot be liable for damages resulting from the operation of the cooling system.[16]

Atkins is further barred from recovery from the carrier or the ship under COGSA. Section 1304 states that neither the carrier nor the ship is responsible for loss arising from neglect in the navigation or management of

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and Mate's Receipts covering refrigerated cargo shipped by this vessel during the period covered by this Charter Party.

. . . . . .

"Refrigeration Clause

"It is also agreed that if the Shipowners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, said vessel, her Owners, Agents, or Officers shall in no case be responsible for any loss or damage to any cargo shipped in refrigerated chambers, whether such loss or damage arise from defect or insufficiency either before or after the shipment, in the Hull of the said vessel, or her Refrigeration Machinery, chambers space or apparatus, or any part thereof, or in any material used in the process of refrigeration, and whether such loss or damage, however, arising be caused by the negligence, fault, error in judgment of the Pilot, Master, Officers, Engineers, Mariners, Refrigeration Engineers of [sic] any other servants of the shipowners or persons for whom they are responsible or by unseaworthiness. It is expressly agreed that any negligence, fault, or error in the operation of the said Refrigeration apparatus shall be deemed to be and is hereby expressly agreed to be a fault of error in the management of the vessel within the meaning of this Bill of Lading, and shall not be considered or held to be a fault of failure in the custody, care or stowage of merchandise shipped in Refrigeration space."

[16] However, Clause 12 stated:

> "That the Captain shall use diligence in caring for the proper ventilation and refrigeration of the cargo, also run temperature in accordance with Charterers' written instructions."

Nevertheless, the Refrigeration Clause was added specifically to the standard charter party form of which Clause 12 was a part. If there is a conflict between these portions, the Refrigeration Clause must here govern. *Cf.* Cooper v. Pinedo, *supra,* 212 F. 2d at 141-42.

the ship.[17] The Refrigeration Clause required to be incorporated into the bill of lading for the cargo, expressly defined any fault in the operation of the refrigeration apparatus as a fault in the management of the ship.

We must reverse the judgment of the district court insofar as it awarded damages to Atkins as a result of loss of cargo on voyage No. 4.

IV.

CHARTER HIRE FOR PERIOD BETWEEN VOYAGES NO. 1 AND NO. 2.

In Mobile.

Fruco declined to pay $5,594.39 potentially due Horn for charter hire. Of that amount, $4,327.73 represented the approximately seven-day period in Mobile, after unloading from the first voyage, when the ship lay without

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[17] §1304: "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

"(2) Neither the carrier nor the ship shall be responsible for loss of damage arising or resulting from—

> "(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. . . ."

See § 1303 (2).

As observed *supra*, incorporation of COGSA into the charter party serves to limit liabilities under the charter to COGSA dimensions.

orders. Approximately one day of that period admittedly was at Horn's expense, for dry-dock inspection, to the amount of $676.44. There is no doubt that the charter party provided that the ship sail on orders of the charterer.

The district court found that "the assertions of Atkins that he rescinded the charter party at the end of voyage No. 1 are unsupported by the evidence." 233 F. Supp. 642.

Atkins testified that after he saw the cargo discharged on arrival from the first voyage, he spoke "a number of times" with Mr. Ulrich Mahn, a representative of the chartering agent. He stated that he told Mahn on June 22, the day of unloading, that the vessel was not suitable and was not properly crewed, and that it was his intention to place the HEINZ HORN off-hire. At another point in his testimony, Atkins stated that he told Mahn that the vessel would remain off-hire until it sailed, and that Mahn agreed. Mahn apparently reassured Atkins with promise of improved services. Atkins said that he agreed to "a trial basis, on a trip-by-trip basis." A letter from Atkins to Captain Freytag on June 25 referred to the second voyage to Puerto Bolivar as a "trial to see if the vessel can carry fruit satisfactorily." Copies of that letter went to Mahn and Mr. Jan Grisbolt, the chartering broker's representative. In response by letter of June 27, Captain Freytag stated that he was unable to agree with Atkins' letter of the 25th and that he, Freytag, had no authority or intent to change any term of the charter party. Mahn testified that he made no agreement with Atkins to the effect that the HEINZ HORN would operate on a trip-by-trip basis, rather than in accord with the charter.

Atkins has further argued that the charter parties were rescinded as a result of frustration of purpose. While the outturn of ripened bananas on subsequent voy-

ages (*see* n. 11, *supra*) apparently was higher than normal, such had not occurred at the point at which Atkins says the charter party was frustrated.

The record supports the conclusion that the charter party was not rescinded at the conclusion of voyage No. 1. *Cf. Aaby v. States Marine Corp.*, 2nd Cir. 1950, 181 F. 2d 383.

Clause 15[18] provides that the charterer is not liable for payment of hire for time lost from "deficiency of men." We have seen already that the owner failed to exercise due diligence with respect to personnel aboard for the first voyage. The testimony shows that the time lost in Mobile, excepting the period of dry dock, resulted from the delay in disposing of the damaged bananas. The bananas were damaged, in part at least, as a result of inadequacy of personnel. The time lost in Mobile resulted from "deficiency of men."

In Puerto Bolivar.

Fruco and Atkins have explained that the HEINZ HORN was expected to turn around and return to Puerto Bolivar for the second voyage immediately after discharging its cargo in Mobile on June 22. The charterer then claims that the condition of the cargo, and its disposition, resulted in the delay in sailing until the 29th, and thus its failure to pick up the cargo scheduled for the second voyage. When the vessel did arrive in Puerto Bolivar, it had to wait two days before a substitute cargo was collected. The charterer withheld $1,266.66 in charter hire for those two days.

Since the time lost here again resulted from the time lost in disposing of bananas damaged on the first voyage,

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[18] "15. That in the event of the loss of time from deficiency of men or stores . . ., the payment of hire shall cease for the time thereby lost. . . ."

we conclude that the time lost was a result of the "deficiency of men," which resulted in the damage to the cargo.

We conclude that the district court was erroneous in awarding the sum of $4,917.95 in charter hire for these two periods.

V.

REDELIVERY OF THE VESSELS TO THE OWNER

HEINZ HORN.

Fruco redelivered the HEINZ HORN to her owner October 3, 1962, a month past the minimum three-month period. She went on hire to another charterer on October 4.

Fruco claimed that it gave notice of redelivery by letter of September 21, confirmed by telegram of September 27. Horn argues that whichever date was the effective date of notice, it was entitled to charter hire for thirty days from that date, as a result of a thirty-day notice requirement in the charter. The district court felt it unnecessary to pinpoint the date of notice, finding that Horn had been able to mitigate any potential damages for lack of use for the vessel by the immediate recharter.

The only testimony regarding the asserted mitigation of damages was from Mahn, the charter broker. His statements, self-serving though they may be, are not controverted by any evidence from Fruco. We might conclude from his testimony that under the subsequent charter the HEINZ HORN operated at an expense differential of $210.96 per day. Adding Horn's daily profit of $6.92, we could find that Horn is entitled to $217.88 per day for each day of the thirty-day period not allowed. Consider-

ing the testimony from another angle, we note that the total hire earned on the subsequent charter was at a higher total rate than the monthly $19,000.00 paid by Fruco. The district court had opportunity to study the testimony in light of the witnesses' demeanor. With this in mind, we are unable to hold erroneous the finding of the court that the owner mitigated any alleged damages. Thus we do not consider the question of whether Horn actually was entitled to its thirty-day notice, or the question of the actual date on which notice of redelivery was made.

MARIE HORN.

The same letter and telephone applied to the MARIE HORN, which was chartered for a four-month minimum period, expiring November 12, 1962. Again, the only testimony as to damages here is from Horn's witness Mahn. The same sort of analysis was made for both vessels and we conclude, as with the HEINZ HORN, that the MARIE HORN mitigated any damages it otherwise might have suffered.

VI.

INTERESTS ON THE JUDGMENTS.

The district court computed interest as follows:

> "Atkins is further entitled to interest at the rate of 6% per annum from June 22, 1962, on the cargo damage on Voyage No. 1, and from September 12, 1962, on the cargo damage on Voyage No. 4.
>
> "Horn is entitled to interest at the rate of 6% per annum from June 22, 1962, on the charter hire withheld as security for cargo damage on Voyage No. 1; from June 29, 1962, for the charter hire withheld for the time the HEINZ HORN was tied up in Mobile;

and from July 8, 1962, for the charter hire withheld for stand-by time in Bolivar." 233 F. Supp. at 643.

Horn argues on appeal that this method of computation, in effect, allows Atkins the benefit of the interest on the sum withheld as security as well as on the sum awarded. This plainly is not correct. We find no error in the assessment of interest.

VII.

The judgment is reversed as to the damages awarded to Atkins from voyage No. 4, and reversed as to the charter hire awarded Horn for the two periods of inactivity prior to voyage No. 2. The judgment is affirmed in all other respects. Costs of appeal are taxed one half against Horn and one half against Fruco and Atkins.

Affirmed in Part and
Reversed in Part.

APPENDIX C.

CIA De Navegacion Fruco, S. A., a Corporation, Libelant,

v.

The M/S HEINZ HORN, Her Engines, Tackle, Apparel, and Furniture, Etc.; Heinrich C. Horn, and Partenreederei, Respondents.

J. R. Atkins, Doing Business as Alabama Fruit and Produce Company, Libelant,

v.

The M/S HEINZ HORN, Her Engines, Tackle, Apparel, and Furniture, Etc., and Heinrich C. Horn, Respondents.

Heinrich C. Horn, as Managing Owner of the M/S MARIE HORN, Libelant,

v.

CIA De Navegacion, Fruco, S. A. and J. R. Atkins, Individually, Respondents.

Heinrich C. Horn, Libelant,

v.

CIA De Navegacion Fruco, S. A., and J. R. Atkins, Individually, Respondents.

Nos. 2958, 2976, 2984, 2988.

United States District Court,
S. D. Alabama, S. D.,
Sept. 14, 1964.

* * * * * * *

Daniel Holcombe Thomas, District Judge.

These consolidated cases arise out of the time charter of two sister ships, the M/S HEINZ HORN and the M/S

MARIE HORN, under a New York Produce Exchange Charter Party, by Cia De Navegacion Fruco, S. A., hereinafter referred to as Fruco from Heinrich C. Horn, hereinafter referred to as Horn. The vessels were chartered for the carriage of bananas between good and safe ports in Ecuador and the Gulf Coast.

The HEINZ HORN was chartered April 30, 1962, and actually went on charter on or about June 3, 1962. The vessel, by terms of the charter party, was to remain on charter for a minimum period of three months to about six months, the exact time to be at the charterer's option. There was provision for thirty-day notice prior to redelivery. Charter hire at the rate of $19,000.00 per month was payable semi-monthly, in advance, in New York.

The MARIE HORN was chartered May 15, 1962, and actually went on charter on or about July 12, 1962. The terms of the charter party were very similar to those of the HEINZ HORN except that the MARIE HORN charter party was for a minimum of four months to about eight months, and the charter hire was at the rate of $19,150.00 per month, payable semi-monthly, in advance. There also was a provision for thirty-day notice on redelivery.

Two of these cases, Admiralty No. 2958 and Admiralty No. 2976, in rem and in personam, were brought by Fruco, as charterer, and J. R. Atkins, individually and doing business as Alabama Produce Company, hereinafter referred to as Atkins, as consignee and owner of the cargo, for damage to the cargo of bananas on two separate voyages of the HEINZ HORN, hereinafter referred to as Voyage No. 1 and Voyage No. 4, and for the alleged breach of the charter party of the HEINZ HORN. (Atkins is also the president of Fruco and its principal stockholder.)

The other two cases, Admiralty No. 2984 and Admiralty No. 2988, were brought by Horn, as managing owner of

the two vessels, against Fruco and Atkins, as guarantor, for charter hire allegedly due on the two vessels.

The HEINZ HORN and MARIE HORN are refrigerated vessels, sister ships of German registry. The vessels are equipped with a horizontal air delivery system. Refrigerated air is delivered into the lower No. 1 hold at the after bulkhead, flows forward and then up into the No. 1 'tween deck; then aft to the aft bulkhead, where it is either exhausted or redelivered into the cooling units. The reverse is true as to the No. 2 hold: refrigerated air is delivered into the lower No. 2 hold at the forward bulkhead, flows aft through the hold, up into the No. 2 'tween deck, and then forward to the forward bulkhead, where it is either exhausted or redelivered into the cooling units. The refrigeration unit on either of these vessels is capable of delivering air at a temperature below zero, Fahrenheit, and the temperature of the delivery and return air can be checked and regulated.

The HEINZ HORN picked up Mr. Dan Christian while passing through the Panama Canal on Voyage No. 1 en route to Puerto Bolivar, Ecuador. Mr. Christion was employed by Atkins but knew nothing of the banana business. He was sent by Atkins on this voyage to observe, in an endeavor to learn the banana trade.

The HEINZ HORN arrived in Bolivar, June 10, 1962. Loading commenced June 11 and was completed in the early morning hours of June 13. The vessel was loaded with bananas which were cut June 10, 11 and 12. The refrigeration on the vessel was not turned on until approximately 6:30 p. m. on June 12, some twenty-four hours after loading had commenced. The bananas upon loading were grass green, fresh and hard.

The entire No. 2 hold was fully loaded with some 9,357 cartons of bananas, at approximately 40 pounds per carton. The No. 1 lower hold was loaded with bananas in

stems while the No. 1 'tween deck had bananas in stems in the wings with cartons in the way of the hatch, for a total in No. 1 hold of 3,539 stems and 2,009 boxes. Some space was left in the No. 1 'tween deck. Before loading, the bin boards, under the direction of Chief Mate Schultz, were removed; and no bin boards, slats or dunnage were used on the voyage.

The loading of the vessel was accomplished under the supervision and direction of the officers of the vessel. Chief Mate Schultz stated that he supervised the stowage of the cargo, thought it was proper and made no objections.

The master of the vessel signed bills of lading for the cargo on June 12, 1962. He noted no exceptions, which attested to the good condition of the cargo. Relying on these clean bills of lading, the letter of credit which had been previously furnished by Atkins was honored and the sale was completed, f. o. b. Ecuador on June 12, 1962.

The vessel sailed from Bolivar in the early morning hours of June 13. Only two mates were aboard, as had been the case during loading. On passing through the Panama Canal, Captain Horn, who had been sick for some time, left the vessel. This left only two mates aboard as the ship's officers. Normally there is a captain plus three mates. None of the officers aboard was experienced with the handling of boxed bananas.

Bananas are very delicate by their nature and present difficulties to their being successfully transported. They are cut in a green state and shipped under refrigeration to delay the ripening process. The ripening temperature for bananas is generally 60°-62° Fahrenheit. For this reason bananas have to be transported at a cooler temperature, and generally 53°-55° Fahrenheit is considered acceptable.

Bananas give off carbon dioxide, ethylene gas and heat which hastens the ripening process. This also hastens the ripening of other bananas in proximity. So it becomes absolutely essential that the hold temperature of the vessel and pulp temperature of the bananas be maintained at approximately 54°-55° Fahrenheit, and that the foul air be exhausted sufficiently to remove the carbon dioxide, ethylene gas and heat.

In order to assure a proper hold temperature for the successful carriage of bananas it becomes imperative that the temperatures of delivery air and return air be very closely controlled. Delivery air should be 52°-53° Fahrenheit, and it should reach that level within eight hours after the hatches are closed. The difference between the temperature of the delivery air and the return air should be no more than 3° after pulldown.

The delivery air never steadied down to 52° Fahrenheit in either hold on Voyage No. 1, and it took approximately thirty-four hours to pull it down to 53° Fahrenheit. Return air also was very slow in being pulled down to a desired level.

The HEINZ HORN docked in Mobile at approximately 8:00 p. m. on the 21st of June, 1962. Discharging operations began at 7:00 a. m. the next morning. A very high percentage of the bananas were found to be yellow in color and in a ripened and ripening condition. Pulp temperatures were taken and some of them were as high as 62° Fahrenheit. Temperatures in the No. 2 hold were higher than in No. 1 hold. The bananas in both holds were damaged, but the greater damage was in the No. 2 hold which was completely filled with boxed bananas. Most of the bananas were damaged to such an extent, meaning ripe or ripening, that they were of no value to an importer.

The ripened state of the bananas was due to the high pulp temperatures at which they had been transported. The primary cause of the high pulp temperatures was the improper stowage of the boxes of bananas.

In the No. 2 hold the cartons of bananas were tightly stowed. No slats, bin boards or dunnage had been used to facilitate the flow of air between the cartons. The cartons were stowed an average of eight tiers high in both compartments of the No. 2 hold. No space was left between the cartons.

A factor which contributed to the ripening of the bananas was the excessive length of time taken in pulling down the temperature of the delivery and return air, and the failure of the vessel to maintain the proper hold temperature.

The bananas were packed in boxes or cardboard cartons designed for and used in the transporting of bananas. These cartons were well ventilated and their construction in no way caused or contributed to the damage done to the bananas.

Of the 9,357 cartons of bananas loaded in the No. 2 hold, only 1,007 were unloaded. Those taken out of the No. 2 hold were salvaged for $1,552.26. The other cartons were left on board the vessel because no buyer was willing to accept the bananas in such a ripened condition. The fair value of a box of good green bananas in Mobile at that time was approximately $3.20.

The charterer did not order the HEINZ HORN to sail again until the 29th of June. By terms of the charter party the vessel was to sail on orders of the charterer. For the time the vessel was tied up in the port of Mobile following discharge, Fruco deemed the vessel off charter and deducted $4,327.73 from the charter hire. During this

time the vessel went on dry-dock for inspection for slightly more than one day. This dry-dock time was at the owner's expense, and admittedly Fruco did not owe Horn for that time, which amounted to $676.44.

Atkins withheld and still withholds payment of charter hire in the amount of $25,946.76 because of his claim for bad cargo on Voyage No. 1.

The HEINZ HORN sailed from Mobile to Bolivar on June 29. Upon arrival in Bolivar the vessel had to stand by for two days awaiting bananas for loading. No bananas were ready to be loaded because the vessel had been delayed in sailing from Mobile. Atkins treated these two days as off charter for which he deducted $1,266.66 from charter hire.

The next claim for damaged bananas arose out of Voyage No. 4 of the HEINZ HORN. On this voyage no personnel were aboard other than the crew. The vessel was loaded and stowed under the supervision and direction of the master and mates at Guayaquil, Ecuador. The load consisted of 8,170 stems of bananas. Several thousand stems of bananas were rejected by the officers of the vessel before they got a complete load of acceptable bananas. For this load the master signed a bill of lading, noting no exceptions, as had been done on Voyage No. 1.

Some two days out of Guayaquil the master checked the bananas and had 335 stems jettisoned because they had begun ripening.

On Voyage No. 4, unlike Voyage No. 1, the stowage of the stems of bananas was accomplished by separating the cargo with bin boards, and the stems were stowed in such a fashion that small spaces were left between them to facilitate the flow of air. Metal gliding sheets had been installed in front of the fans and turning vanes had been installed subsequent to Voyage No. 1 in an

attempt to increase circulation in the holds. The return air on Voyage No. 4 was not pulled down to the proper level for forty-eight hours in hold No. 2 and thirty-six hours in hold No. 1.

The HEINZ HORN docked in Mobile on Voyage No. 4 on the 11th of September 1962, and discharging commenced on the 12th. A very high percentage of these bananas were ripe and turning. Of the entire cargo, 519 stems were left aboard ship because they were too ripe to sell. Some 44% of the cargo was classified as green but could not be sold at the same price as good green fruit. Some 709 stems were sent to the city dump because they were too ripe to sell. The rest of the cargo was sold but at a reduced rate, due to the ripened condition.

On September 12, 1962, good green bananas were selling for approximately $5.00 per hundred pounds in Mobile. A stem of bananas averages approximately 85.44 pounds. None of the bananas on Voyage No. 4 brought as much as $5.00 per hundred pounds. The entire cargo was sold for only $16,408.51.

The HEINZ HORN made one more trip for Fruco and was then placed off charter. Atkins, as Fruco's representative, notified Mr. Mahn, the representative of Horn, by letter on September 21, 1962, of his intention to place both the vessels off hire at the end of their then present voyages. A telegram from Atkins to Mahn dated September 27, 1962, confirmed this intent.

The MARIE HORN was redelivered on the 27th of September, 1962, and the HEINZ HORN was redelivered on the 3rd of October, 1962. The minimum period of charter under the MARIE HORN's charter party was four months, which meant that she should have stayed on charter until November 12, 1962. The minimum for the HEINZ HORN was three months, and that time

ended September 3, 1962. So, the HEINZ HORN sailed for more than the minimum time but the MARIE HORN was redelivered some 46 days before her minimum time had expired.

Following redelivery the HEINZ HORN immediately went on hire for another charterer. In fact, she went on hire on the 4th of October, 1962. The vessel was able to mitigate any damages she might have actually sustained as a result of the failure of Atkins to give a thirty-day notice on redelivery.

Following redelivery, the MARIE HORN went on hire to another charterer and was able to mitigate any damages which might have resulted from the failure of Atkins to give a thirty-day notice on redelivery and from the early redelivery. In fact, the vessel was booked on September 3, 1962, for delivery to this subsequent charterer on October 1, 1962. This booking was made approximately three weeks prior to the notice of redelivery given by Atkins.

Conclusions of Law.

[1, 2] The charter party provided that the cargo was to be loaded at the expense of the charterer, but under the supervision of the Captain. It further provided that the charter party could not be construed as a demise of the vessel to the charterer, and that the owners were to remain responsible for navigation of the vessel, insurance, crew, and other matters, the same as if trading on their own account. The Carriage of Goods by Sea Act, which was incorporated in the "USA Clause Paramount" attached to the charter party, and which is controlling wherein it conflicts with the provisions of the charter party, provides that the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried. So, as spelled out in the

charter, the proper stowage of the bananas became the responsibility of the carrier, Horn, and as such makes the vessel responsible for any cargo damage resulting from improper stowage. Mobile, Miami & Gulf S. S. Co. v. Lake Giltedge S. S. Co., 5th Cir., 1934, 68 F. 2d 370. Mondella v. S. S. Elie V, D. C. S. D. N. Y. 1963, 223 F. Supp. 390.

[3, 4] Under a time charter, such as we have in this case, the members of the crew and officers remain the shipowner's men. Bergan v. International Freighting Corp., 2 Cir., 1958, 254 F. 2d 231. In the instant case, the bananas were loaded and stowed under the supervision of the officers of the vessel; and they made no objections to the stowage, though they were under a duty to do so if they thought the stowage improper. The Atlanta, D. C. S. D. Ga. 1948, 82 F. Supp. 218.

[5] The bananas, on both Voyage No. 1 and Voyage No. 4, were in good order and condition when delivered into the custody of the vessel. Upon arrival in Mobile the bananas were extensively damaged, in that a high percentage of them were ripe and turning and of no value to an importer. Under these circumstances the vessel has the burden of proving that due diligence was exercised, or that the damage resulted from some inherent vice, or through no fault of the vessel, as pleaded. Compagnie De Navigation, etc. v. Mondial United Corp., 5th Cir., 1963, 316 F. 2d 163; Cooper v. Pinedo, 5th Cir., 1954, 212 F. 2d 137.

[6] There was no proof of inherent defect, quality or vice of the bananas. The vessel failed to use due diligence to insure the safe carriage of the bananas in that the officers failed to cause the bananas to be stowed properly. The vessel further failed to exercise due diligence in promptly pulling the air temperature down and maintaining the delivery and return air temperature at the desired level.

The Horn vessels were seaworthy. Undoubtedly the vessels are not the best banana carriers to be had, but they are and were capable of safely transporting bananas, providing due diligence is exercised.

[7] Without finding specifically that Fruco had a right to rescind the charter party, I find that it did not in fact rescind. The assertions of Atkins that he rescinded the charter party at the end of Voyage No. 1 are unsupported by the evidence. The fact that he did not order the vessel to sail again until the 29th of June does not support such assertion. The vessel remained on charter while tied up at Mobile, and the owners are entitled to charter hire for all this period except for the time the vessel was on dry-dock. The owners are entitled to the $4,327.73 which was withheld from charter hire for this time, less $676.44 for the time when the vessel was on dry-dock. Likewise the owners are entitled to the $1,266.66 withheld from charter hire for the two days standing by, awaiting bananas in Bolivar.

Having found that there was no breach of the owner's undertaking of seaworthiness of carrying bananas, the owner or vessel is entitled to that amount of charter hire which was withheld by Atkins as security for damage to the cargo on Voyage No. 1. The damage to the cargo, for which the vessel was responsible, may be set off against earned charter hire.

Having thus found that the owners of the vessels are entitled to any charter hire remaining unpaid, that the vessels were able to completely mitigate any damages which might have resulted by being placed off charter without proper notice, and that Atkins is entitled to recover the damage to the cargo on Voyage No. 1 and Voyage No. 4, it is found that the parties are entitled to their damages as follows:

ATKINS:

Cargo damage Voyage No. 1	$31,261.64
Cargo damage Voyage No. 4	18,495.73
Total	$49,757.37

HORN:

Charter hire withheld as security for cargo damage on Voyage No. 1	$25,946.76
Charter hire for time HEINZ HORN was tied up in Mobile after Voyage No. 1 less repair time ($4,327.73 less $676.44)	3,651.29
Charter hire for two days of stand-by time in Bolivar	1,266.66
Total	$30,864.71

Atkins is further entitled to interest at the rate of 6% per annum from June 22, 1962, on the cargo damage on Voyage No. 1, and from September 12, 1962, on the cargo damage on Voyage No. 4.

Horn is entitled to interest at the rate of 6% per annum from June 22, 1962, on the charter hire withheld as security for cargo damage on Voyage No. 1; from June 29, 1962, for the charter hire withheld for the time the HEINZ HORN was tied up in Mobile; and from July 8, 1962, for the charter hire withheld for stand-by time in Bolivar.

A decree in accordance herewith will issue.

APPENDIX D.

CARRIAGE OF GOODS BY SEA ACT.

Act of 1936.

American.

Bills of Lading Subject to Act.

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act. (*46 U. S. C. 1300*).

Definitions.

Sec. 1. When used in this Act—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. (*46 U. S. C. 1301*).

Duties and Rights of Carrier.

Sec. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth. (*46 U. S. C. 1302*).

Responsibilities and Liabilities of Carrier and Ship.

Sec. 3. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided,* That nothing in this act shall be construed as repealing or limiting the application of any part of the act, as amended, entitled "An act relating to bill of lading in interstate and foreign commerce", approved August 29, 1916 (U. S. C., title 49, secs. 81-124), commonly known as the "Pomerene Bills of Lading Act."

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier

to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided,* That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not effect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the

shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided,* That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. (*46 U. S. C. 1303*).

Rights and Immunities.

Sec. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Restraint or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general; *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount

than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. (*46 U. S. C. 1304*).

Surrender of Rights and Immunities and Increase of Responsibilities and Liabilities.

Sec. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this act. Nothing in this act shall be

held to prevent the insertion in a bill of lading of any lawful provision regarding general average. (*46 U. S. C. 1305*).

Special Conditions.

Sec. 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligations as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided,* That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided,* That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. (*46 U. S. C. 1306*).

Agreement as to Liability Prior to Loading or After Discharge.

Sec. 7. Nothing contained in this act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for

the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea. (*46 U. S. C. 1307*).

Rights and Liabilities Under Other Enactment.

Sec. 8. The provisions of this act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels. (*46 U. S. C. 1308*).

Discrimination Between Competing Shippers.

Sec. 9. Nothing contained in this act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this act; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this act; or (c) in any other way prohibited by the Shipping Act, 1916, as amended. (*46 U. S. C. 1309*).

Weight of Bulk Cargo.

Sec. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this act, the bill of lad-

ing shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper. (*46 U. S. C. 1310*).

Liabilities Before Loading and After Discharge; Effect on Other Laws.

Sec. 12. Nothing in this act shall be construed as superseding any part of the act entitled "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property", approved February 13, 1893, or of any other law which would be applicable in the absence of this act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship. (*46 U. S. C. 1311*).

Scope of Act; "United States"; "Foreign Trade."

Sec. 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this act the term "United States" includes its districts, territories, and possessions: *Provided, however,* That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods

by sea between such ports, containing an express statement that it shall be subject to the provisions of this act, shall be subjected hereto as fully as if subject hereto by the express provisions of this act: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this act. (*46 U. S. C 1312*).

Suspension of Provisions by President.

Sec. 14. Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of title I of this act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation suspend any or all provisions of title I* of this act for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of title I hereof, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this act, effective during any period when title I hereof, or any part thereof, is suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may have thus been suspended. (*46 U. S. C. 1313*).

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* Secs. 1301-1308.

Effective Date; Retroactive Effect.

Sec. 15. This act shall take effect ninety days after the date of its approval; but nothing in this act shall apply during a period not to exceed one year following its approval to any contract for the carriage of goods by sea, made before the date on which this act is approved, nor to any bill of lading or similar document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid. (*46 U. S. C. 1314*).

Short Title.

Sec. 16. This act may be cited as the "Carriage of Goods by Sea Act." (*46 U. S. C. 1315*).

APPENDIX E.

THE HARTER ACT.

(U. S. Code, Title 46, §§ 190-195.)

[Feb. 13, 1893.]

Sec. 1. It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United

States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Sec. 4. It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the

vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

Sec. 6. This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

APPENDIX F.

June 1, 1962.

Captain M/S "HEINZ HORN"
c/o L. K. Cofer
P. O. Box 192
Balboa, Canal Zone

Dear Sir:

As per advices we have received from New York, we understand that you are scheduled to depart from Mayaguez Monday afternoon, June 4. In accordance with our charter, we are taking delivery of the ship upon dropping pilot at Mayaguez. We wired you today advising that you are to proceed to Puerto Bolivar, Ecuador to load cargo of bananas for Mobile, Alabama U. S. A.

Our agent in the Canal Zone who will handle your transit both ways through the Canal is L. K. Cofer. He has a radiotelephone, therefore you can contact him the day before your arrival at Christobal and Balboa giving him your ETA in order that he may arrange for speedy passage through the Canal.

Our connection in Puerto Bolivar who will take care of loading the vessel is Jose Turner of Comercial Latinoamericana S.A. whose address is P. O. Box 33 Machala, El Oro, Ecuador. For your information, Machala is approximately three to five miles from Puerto Bolivar where you will load. Although these people are experienced in the loading of bananas, we desire you to see that your ship is loaded properly.

We will load both bananas in stems covered with polyethylene bags and in 40 pound cardboard cartons (or boxes). Upon loading you will notice that the polyethylene bags have approximately ½" ventilation holes on 3" to 4" centers. The cardboard cartons, are as you will notice,

ventilated both top and bottom. Also has four large ventilation holes on both sides and in addition has hand holes at the end. We have been loading these boxes on our own vessel, MARTHA ANNE, and our experience in carrying the fruit in boxes has been very good, therefore, you should have no difficulties providing you follow our instructions.

Be sure and instruct your engineers to see that the vessel is precooled before loading. We desire you to maintain a 54-55 degree pulp temperature of the bananas on your trip from Bolivar to Mobile. We fully appreciate that in view of the fact the pulp temperature of the bananas when they are loaded will be considerably higher than this. That it will take you anywhere from 18 to 30 hours to pull down your fruit whereby it will have a temperature of 54 to 55 degrees. We also realize that you have ample refrigeration, in fact enough for deep freeze, therefore, do not be in a hurry to reduce the temperature of your fruit after loading and blow real cold air through your system.

Under no circumstances after you finish loading should your delivery air be below 52 degrees at anytime during the trip. It would be better if you would let this delivery air be between 52 and 53 degrees. Please understand this low of 52-53 degrees also applies to the reduction period which we estimate will be anywhere from 18 to 30 hours. Please remember to instruct your engineers to be very careful and not chill this fruit. Tell them that it is possible to sell ripe fruit whereas chilled fruit is worthless.

We have scheduled you for loading in Puerto Bolivar either the 12th or 13th all according to your arrival time there.

When you depart from Balboa for Puerto Bolivar, our agent, L. K. Cofer, is suppose to wire Comercial Latino-americana in Machala giving them your departure from

Balboa and your ETA Puerto Bolivar. Normally this trip should take you about 65 to 68 hours. Be sure and remind the agent to send this wire to the people at Machala.

On your departure from Puerto Bolivar the Comercial Latinoamericana will wire us giving your sailing time, manifest, ETA at Balboa and ETA Mobile. They will also wire Cofer at Balboa giving him your ETA at Balboa. Please remind Comercial Latinoamericana to send these wires when you depart.

When you depart from Cristobal coming to Mobile, our agent, Cofer, is suppose to wire us in Mobile giving your departure from Christobal and your ETA Mobile. Again remind Cofer to send this cable. Our cable address which he already knows is ALFRUCO.

As soon as possible after you depart from Christobal call us on the radiophone. Our phone numbers are as follows—Mobile, Alabama:

Office	Hemlock 8-4561
Residence—J. R. Atkins	473-7287
Residence—E. H. Haas	479-5526

Again let me remind you to instruct your engineers that we desire them to maintain a pulp temperature of 54-55 degrees on the bananas on the trip to Mobile. Also under no circumstances, even though his reduction period may take a little longer, blow delivery air lower than 52-53 degrees on the fruit.

Yours very truly,

CIA De Navegacion
Fruco SA.
J. R. Atkins

JRA/mc

APPENDIX G.

(Letterhead of German Consulate General,
New York, N. Y. 10022.)

V 2-82/6 July 22, 1968

Lamorte, Burns & Co., Inc.
26 Broadway,
New York, N. Y. 10004

Attention: Mr. August C. Burns

Re: MV "HEINZ HORN" and MV "MARIE HORN"

Sir:

I thank you very much for your letter—ACB/ca—of July 17, 1968.

The MV "HEINZ HORN" as well as the MV "MARIE HORN" belongs to the category of regular freighters. Both vessels are relatively small, namely 1138 gross tons, 607 net tons or 3223 cubic meters.

The respective German Code, the "Verordnung über die Besetzung der Kauffahrteischiffe mit Kapitänen und Schiffsoffizieren (Schiffsbesetzungsordnung)" of June 29, 1931 (last version of March 1, 1966) requires a Master and only **two** Mates for vessels of that class.

A copy of said Code and an official duplicate of this letter are attached for your convenience. Unfortunately there is no English edition available. Paragraph 10, Section 2 calls for special attention.

Hoping that this letter answers your questions, I remain,

very truly yours,

(Seal) G. Hauptmann,
G. Hauptmann.

§ 10⁵

Beseizung der Schiffe in der groben Fahrt.

a) Kapitän und Seestcuerlcuie: In der groben Fahrt mub der Kapitän ein Befähigungszeugnis A 6 besitzen.

Neben dem Kapitän sind Schiffe von nicht mehr als 2000cbm Bruttoraumgchalt mit einem, Schiffe von mehr als 2000 cbm Bruttoraumgchalt mit zwei und Fahrgastschiffe jeder Art mit drei Seesieuerleuten zu besetzen.

Unofficial Translation

§ 10⁵

Manning of ships in all ocean travel

(a) Captain and Mates: In the all ocean travel the Captain must possess a qualification ticket A 6.

Besides the Captain ships of not more than 2000 cubic-meter gross space contents are to be manned with one, ships of more than 2000 cbm gross space contents with two, and passenger ships of every kind with three mates.

APPENDIX H.

A. EXTRACTS FROM RELEVANT CHARTER PARTY.

Clause 8. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by owners), shall be under the orders and directions of the charterers as regards employment and agency; and charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign bill of lading for cargo as presented, in conformity with mate's or tally clerk's receipts.

B. EXTRACTS TAKEN FROM OPINIONS FROM **Canadian Transport Co. v. Court Line, Ltd.**, House of Lords, 1940 A. C. 934.

In the House of Lords, Lord Atkin has said:

"By clause 8 of the charter party '. . . the charterers are to load, stow and trim the cargo at their expense under the supervision of the captain who is to sign bills of lading for cargo, as presented in conformity with mates' or tally clerks' receipts.' By clause 24 of the charter was expressly made subject to the terms of the Carriage of Goods by Sea Act of the United States, April 1, 1936, and the Canadian Water Carriage of Goods Act, 1936 . . ."

". . . The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the cap-

tain's orders, and that their own proposed stowage would have caused no damage no doubt that might enable them to escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely; . . ." (pp. 937, 8).

On the same matter, Lord Porter has stated:

". . . In my opinion by their contract the charterers have undertaken to load, stow and trim the cargo, and that expression necessarily means that they will stow with due care. Prima Facie such an obligation imposes upon them the liability for damage due to improper stowage. It is true that the stowage is contracted to be effected under the supervision of the captain, but this phrase does not, as I think, make the captain primarily liable for the work of the charterers' stevedores. It may indeed be that in certain cases as, e. g., where the stability of the ship is concerned the master would be responsibile for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge . . ." (pp. 951, 2).

Like the Court of Appeal below it, the House of Lords is unanimous in its conclusion that under the quoted clause of Article 8 of the charter party the charterers have the primary duty to stow safely.

SUPREME COURT, U. S.

FILED

MAR 18 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1002

HEINRICH C. HORN,

Petitioner,

versus

CIA DE NAVEGACION FRUCO, S. A., and J. R. ATKINS, d/b/a ALABAMA FRUIT AND PRODUCE COMPANY,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

T. K. JACKSON, JR.
1101 Merchants National Bank Building
Mobile, Alabama 36601
Counsel for Respondent

RAE M. CROWE
W. BOYD REEVES
Armbrecht, Jackson & DeMouy
1101 Merchants National Bank
Mobile, Alabama
Of Counsel

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 1002

HEINRICH C. HORN,

Petitioner,

versus

CIA DE NAVEGACION FRUCO, S.A., and
J. R. ATKINS, d/b/a ALABAMA FRUIT
AND PRODUCE COMPANY,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents, Cia de Navegacion Fruco, S.A., and J. R. Atkins, d/b/a Alabama Fruit and Produce Company, respectfully submit their brief in opposition to Petitioner's Writ of Certiorari seeking review by this Court of a judgment of the United States Court of Appeals for the Fifth Circuit, affirming in part and reversing in part a decree in Admiralty rendered by the United States District Court for the Southern District of Alabama.

EARLIER REPORTS

The opinion of the District Court is reported at 233 F.

Supp. 637 (Appendix C of Petition). The opinion of the Court of Appeals entered on November 5, 1968 is reported at 404 F. 2d 422 (Appendix A of Petition).

Respondents are satisfied with the presentation of JURISDICTION, QUESTIONS AT ISSUE, and STATUTES INVOLVED as set forth in the Petition of Heinrich C. Horn, Petitioner.

STATEMENT OF THE CASE

Respondents are not in agreement with the statement of the case as set forth in the Petition of Petitioner for Writ of Certiorari and respectfully make the following statement of the case:

There is involved in this action four (4) cases which were consolidated for trial in the District Court and consolidated on appeal in the Court of Appeals. All of the cases arose out of the charter of two sister vessels, the HEINZ HORN and MARIE HORN, by Petitioner to the Respondent Cia de Navegacion Fruco, S.A. The first case, referred to by the courts below as Voyage Number 1, involved a shipment of bananas in boxes and stems on the HEINZ HORN; the second case, referred to by the courts below as Voyage Number 4, involved a shipment of bananas on the HEINZ HORN in stems; the third case involved a claim by Petitioner for charter hire of the HEINZ HORN; and the fourth case involved a claim by Petitioner for charter hire as to the MARIE HORN. Petitioner seeks a review only of the decision of the Court of Appeals as to the three cases involving the HEINZ HORN.

On April 30, 1962, Cia de Navegacion Fruco, S. A. (herein referred to as "Fruco") entered into a time charter

agreement with Heinrich C. Horn (herein referred to as "Horn") for the charter of the M/V HEINZ HORN for the carriage of bananas between good and safe ports in Ecuador and the Gulf Coast. The charter agreement, while on a New York Produce Exchange Charter Party printed form, was replete with deletions, interlieations, and appended over 40 additional mimeographed clauses so as to make the charter agreement applicable only to the partics here involved. The charter specifically and emphatically warranted the vessel as a banana carrier and also expressly, by typewritten interlineation, warranted that the master would "use diligence in caring for the proper ventilation and refrigeration of the cargo", and "also run temperatures in accordance with charterer's instructions."

Although warranted as a "banana carrier" the HEINZ HORN was admittedly neither designed nor utilized exclusively as a banana carrier, and it carried frozen produce on many occasions where production of subfreezing air is required.

Pursuant to the said charter party the HEINZ HORN went on charter to Fruco at Mayaguez, Puerto Rico on or about June 3, 1962. The vessel proceeded to Puerto Bolivar, Ecuador to commence its initial voyage under the charter. In accordance with the charter, the charterer delivered written instructions to the ship before it arrived in Bolivar advising as to the care in stowing of the cargo and maintenance of temperatures. The vessel arrived in Bolivar on June 10th and commenced loading bananas under the supervision of the ship's officers (R. 244). The bananas were loaded on board the vessel in both stems and boxes. On June 12, 1962, the master signed two clean receipts or bills of lading for the cargo, without exception, acknowledging it to be in good order and condition. Respondent Alabama

Fruit & Produce Company was consignee of the cargo and upon presentation of the clean bills of lading, a letter of credit furnished by Alabama Fruit & Produce Company was honored by an Ecuadorian bank and the sale consummated to Alabama Fruit & Produce on June 12, 1962. The stowage of the cargo in the hatches was supervised by Wilhelm Schultz, the Chief Officer, or by the mate on watch. The Master of the vessel, being ill, was never seen on deck during the loading operation in Puerto Bolivar by witness Jose Turner (R. 240), although the Chief Mate testified to the contrary.

The Chief Mate and the mate on watch supervised the loading of the cargo as evidenced by the following entry in the vessel's deck log for June 12, 1962 (L. Ex. 36):

> *"The cargo was loaded under supervision of the Captain and officers.* The ship was at the beginning of the voyage in a thoroughly seaworthy condition, and was properly fitted out and provisioned. *The crew was complete and healthy."* (Emphasis supplied)

During the three day period while the cargo was being loaded and stowed, the ship's officers failed and/or refused to operate the vessel's refrigeration equipment. The refrigeration equipment was finally placed in operation at 6:00 p.m. on June 12th, and the vessel sailed for Mobile, Alabama at midnight on the same day.

On June 15th, according to the Chief Mate, the vessel passed through the Panama Canal, and the Master, who had been ill for sometime, left the vessel. It should be noted that the Master's illness was neither sudden nor unexpected. He had been, according to the Chief Mate, seriously ill for several months before the vessel went on charter and prior

to the time the vessel ever reached Puerto Bolivar.

The only evidence presented at the trial as to the normal complement of officers required on the vessel was the testimony by deposition of the Chief Mate who testified the normal complement of officers was a Master and three (3) mates, but that there were only two (2) mates aboard who shared the third officer's pay (L. Ex. 40, pp. 5, 6).

The Petitioner appends as an Appendix G to his Petition a printed copy of a letter from the office of the German Consulate General to Messrs. Lamote, Burns & Co., Inc. (Neither of whom were parties to this litigation in the courts below) to the effect that a German Code, which has never been offered in evidence in this cause, requires only a Master and two mates on the class of vessel of the HEINZ HORN. The said letter is dated July 22, 1968 (several years after the trial of the subject case in the District Court) and was not offered in the District Court; the letter was first presented in the Court of Appeals as an appendix to the Petitioner's Petition for Rehearing filed in the said Court of Appeals following that Court's initial opinion dated June 28, 1968. While it is submitted the letter is completely inadmissible at this late date as being hearsay, self-serving, irrelevant, incompetent and immaterial, the fact remains that

irrespective of the new contended complement of mates under the alleged German Code, the normal complement of mates on the HEINZ HORN was three (3) mates according to the testimony of the vessel's Chief Mate and as found by the District Court.

Neither the Master nor the two young mates were experienced with the carriage of bananas in boxes; nor had the HEINZ HORN ever carried boxed bananas. The

experience of the Chief Mate was primarily with general cargo.

The vessel arrived in Mobile, Alabama on June 21st at 8:00 p.m. and her hatches were opened for the commencement of discharging operations at 7:00 a.m. on June 22nd. At this time, it was discovered that the greatest part of the fruit cargo was in a ripe, ripening and/or turning condition, with much of it "ready to eat." The cargo in the No. 2 hold was almost a total loss; and contrary to the statement and argument of Petitioner, the same pattern of damage existed in the No. 1 hold. The Chief Mate testified that he saw "a high percentage of ripe ones" (bananas) in the No. 1 hold (L. Ex. 40, pp. 53, 54), and that in his opinion the vessel had a poor output in the No. 1 hold (L. Ex. 40, p. 60). Witness Haas testified the fruit in the No. 1 hold had a high percentage of ripes and that *some* of the fruit in the No. 1 hold was sold, but not all of it (R. 213). The trial court found damage to the *entire* cargo, not just damage in the No. 2 hold as Petitioner endeavors to state. The record clearly shows that all the cargo in the No. 1 hold was not accepted and sold as stated by Petitioner in his Petition for Writ of Certiorari.

The District Court found, on substantial evidence, that the vessel failed to exercise due diligence to insure the safe carriage of the cargo in that her officers failed to cause the bananas to be stowed properly, and further found the vessel failed to exercise due diligence in promptly pulling down the air temperature in the cooling system and maintaining the temperature at the desired level.

The Court of Appeals affirmed the determinations of the trial court and found they were not clearly erroneous, citing Rule 52(a), Federal Rules of Civil Procedure,

McAllister v. United States, 1954, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20, and other authorities. In addition, the Court of Appeals concluded the vessel was unseaworthy with regard to its personnel, and further held under the particular charter party and the specific facts involved, the vessel was responsible for the faulty stowage of the cargo. Damages were awarded Respondents Atkins, consignee of the cargo, and Fruco in the amount of $31,261.64; Horn was awarded damaged for charter hire withheld in the sum of $26,946.76.

Immediately following the first voyage of the HEINZ HORN, Respondents held several discussions relative to the damage and performance of the vessel with Petitioner over a pierod of approximately seven days while the vessel remained off hire in Mobile. Subsequently, the vessel sailed for Puerto Bolivar and stood by for two days waiting for a cargo to be collected. The District Court awarded Horn charter hire for these periods, and the Court of Appeals reversed on the ground the delay resulted from a "deficiency of men" under Clause 15 of the Charter.

On the fourth voyage of the HEINZ HORN, the Master again signed a clean bill of lading, noting no exceptions, for a shipment of 8,170 stems of bananas consigned to Respondent Atkins. The cargo arrived in Mobile with 55.6% of the fruit ripe and turning. This entire cargo consisted of stems of bananas. The Master of the vessel testified by pretrial deposition that he and his officers were on deck during loading of the cargo and that they rejected any stems about which they had any suspicion and that the cargo when loaded looked good to him. The District Court found there was no proof of inherent defect, quality or vice of the cargo; the Court awarded damages of $18,495.73, plus interest to Respondents. The Court of Appeals affirmed

and in addition held that the provisions of the Carriage of Goods by Sea Act barred Horn from raising the refrigeration clause of the charter party as a defense.

The Court of Appeals further affirmed the District Court's finding that Horn had mitigated any damages it may have sustained by reason of the M/V HEINZ HORN and her sister ship the M/V MARIE HORN being redelivered prior to the expiration of the charter periods for the vessels.

REASONS FOR REFUSING THE WRIT

The issues in the present case are of such limited breadth that they fall far short of meriting review by this Court on certiorari. As may be readily observed from a review of the opinion of the Court of Appeals below, this case turned primarily in the District Court on a determination of contested facts, and the Petitioner is in effect requesting this Court to again review those facts which have been previously resolved against him. The Court of Appeals, on the basis of Rule 52(a) Federal Rules of Civil Procedure and *McAllister vs. United States,* 1954, 348 U.S. 19, 75 S. Ct. 6, 99 L. ed. 20, accepted the determinations of the District Court and found they were not clearly erroneous.

The conclusions reached in the Court of Appeals were based on the particular charter agreement involved and the facts as presented by the evidence. The charter agreement, while on a New York Produce Charter Party printed form, was extensively amended by deletions, additions and interlineations to set forth the agreement of the parties involved in this litigation and the exact purpose for which the vessel was to be used (R. Ex. No. 2). The charter party, as thus amended, was not a standard printed form, but was

in terms applicable to the parties to this particular litigation and to the particular and specialized cargo involved. Consequently, this particular litigation is not of interest to the shipping industry as a whole, but it is of interest only to the litigants here involved in light of the facts as presented.

The decision of the Court of Appeals is clearly correct, and there is no conflict of decisions presented in this case nor does it present any important question of Federal law requiring consideration and decision by this Court.

I

The decision below is clearly correct.

The Court of Appeals affirmed the judgment of the District Court awarding damages to Respondents as to Voyage Number 1 of the HEINZ HORN on two separate grounds. These theories are: (1) under the facts the vessel was unseaworthy due to the lack of an adequate and competent crew, relying on this Court's decision of *International Navigation Co. vs. Farr & Bailey Mfg. Co.*, 1901, 181 U.S. 218, 21 S. Ct. 591, 45 L. ed. 830, and its own decision of *The Framlington Court*, (5 Cir., 1934) 69 F. 2d 300, cert. denied 292 U.S. 651, 54 S. Ct. 860, 78 L. Ed. 1500; and (2) the damage to the cargo resulted from improper stowage, said stowage, having been supervised by the master and officers, was the responsibility of the vessel. Both of these findings were substantially supported by law and fact.

a.

Inadequate Crew

Petitioner complains there is no support for the Court of Appeals conclusion that a vessel is deemed to be

unseaworthy at the commencement of the voyage unless the owner insures that adequate and competent personnel will remain on board throughout the voyage. Such conclusion is amply supported by this Court's decision of *International Navigation Co. vs. Farr & Bailey Mfg. Co.*, supra, and by the case of *The Framlington Court*, supra, both of which were relied upon by the Court of Appeals. Here, the Court found the vessel's officers were both numerically inadequate and lacking in proper training for the carriage of the delicate cargo of bananas, and this situation not only continued throughout the first voyage, but it was in existence when the vessel initially went on charter.

Both the trial court and the Court of Appeals correctly found the vessel failed to exercise due diligence in the carriage of the cargo. The Court of Appeals held, and correctly so, that it was immaterial whether the cause of the loss was manifested by the numerical inadequacy of the crew, or the want of proper training and instruction, since Petitioner failed to carry its burden of proving an absence of causation between the unseaworthiness and the loss. The charter party and the particular shipment of bananas were subject to the Carriage of Goods by Sea Act, 46 U.S.C. 1301 et seq. Section 1304 (1) of that Act provides in part:

> "Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section."

The Act further provides in 1304 (2)(q) that:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from --

* * * *

> "(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

COGSA clearly placed the burden of proving lack of causation on the Petitioner, and the court below concluded Petitioner failed to carry this burden.

Petitioner contends that the Third Circuit Court of Appeals decision of *The Oritani,* (3 Cir., 1931) 54 F. 2d 1075, affirming 40 F. 2d 522, is in conflict with this case on the burden of proof issue. However, a reading of the case will show that the case is clearly not in conflict with the case at bar. Furthermore, it was decided in 1931 under the Harter Act, 46 U.S.C. 190, et seq. and not under COGSA which was enacted in 1936. Consequently, there could be no conflict between this case and *The Oritani,* supra, because COGSA has in effect supplemented the Harter Act. However, irrespective of any contended conflict on the issue of who bears the burden of proof as to causation, the evidence in the trial court was overwhelming that the vessel had an incompetent and inexperienced crew which failed to exercise due diligence in the carriage and stowage of the cargo; in addition, the District Court found, and the Court of Appeals affirmed, that the necessary temperatures for the carriage of the delicate cargo of bananas was not reached within the period of time required for the safe and proper carriage of bananas. It obviously

follows that such failures were the direct cause of the damage to the cargo.

The evidence was conclusive that the crew was inadequate and failed to exercise due diligence. This finding of the Court of Appeals was correct and should not be disturbed. *McAllister vs. United States,* supra.

b.

Improper Stowage

The Court below concluded that the cargo was improperly stowed under the supervision of the master and his mate and that such improper stowage was, under the facts presented, the responsibility of the vessel. The evidence clearly reflected that the ship's officers supervised the stowage. The vessel deck log contains the entry:

> "The cargo was loaded under supervision of the Captain and officers."

The Court of Appeals, relying on this Court's decisions *Oxford Paper Co. vs. The Nidarholm,* 1931, 282 U.S. 681, 51 S. Ct. 75 L. ed. 614, and *The Southwark,* 1903, 191 U.S. 1, 24 S. Ct. 1, 48 L. ed. 65, held that the stowage of the cargo "affected the capacity of the ship to transport the delicate cargo in the manner specified by the charter party" and consequently the "decisions by and for the master with regard to the stowage must be said to have been made on behalf of the ship's owner." Such holding is in accord with the decision of this Court in *Oxford Paper Co. vs. The Nidarholm,* supra, wherein the Court said:

> "This warranty extends to unseaworthiness of the ship due to faulty stowage of cargo...*even though the*

> *charterer himself, subject to the supervision of the Captain, loads it himself. The charterer is entitled to rely on the Master in the exercise of his expert knowledge and judgment,* to control the disposal of the cargo so as to avoid damages to it from any consequent unseaworthiness of the vessel." (Emphasis is supplied.)

As pointed out in the opinion of the Court of Appeals, the facts of this case are distinguishable from those decisions which the Petitioner here contends to be in conflict because here the method of stowage, which was selected and supervised by the Master or the mate on his behalf, directly affected the ability of the vessel to provide the required mode of transportation.

Petitioner recognizes the correctness of the Appellate Court's conclusion that Respondent Atkins, as cargo owner, has an *in rem* action against the vessel, but complains that Fruco, as charterer, may also be liable to Atkins. The undisputed facts is that Atkins has not sued Fruco; he has sued the vessel *in rem* and Horn *in personam.* Irrespective of whether Fruco, as charterer, may be liable to Atkins, as cargo owner,this would not relieve Petitioner or the HEINZ HORN, *in rem,* of their liability for cargo damage. *Pioneer Import Corp. vs. SS LAFCOMO,* et al., (D. Ct. N.Y. 1943) 49 F. Supp. 559, aff'd 138 F. 2d 907, cert. denied, 321 U.S. 766.

Petitioner contends the Court of Appeals incorrectly concluded the burden of establishing inherent vice in the cargo loaded on Voyage Number 4 of the HEINZ HORN rested with the Petitioner. While the Appellate Court upheld the trial court's finding that there was no proof of inherent defect, quality, or vice in the banana cargo on Voyage

Number 4 as not being clearly erroneous, the Court also affirmed the District Court's determination that the vessel's crew failed to exercise due diligence in the operation of the vessel's refrigeration equipment. Such due diligence was required of the vessel under Clause 12 of the charter party.

It appears that Petitioner is arguing that the Appellate Court should have applied a ruling that because the internal condition of the cargo was not adequately revealed by external appearances,the Respondents should have been required to present some evidence beyond a clean bill of lading as to the condition of the cargo at the time of loading. While such a contention overlooks the fact that this cargo consisted entirely of stems of bananas which were readily observable by the Master and his mate, the record clearly shows that further evidence, although not necessary, of the condition of the fruit at the time of loading was in fact offered. The testimony of the Master and Chief Officer was offered by Respondents, as well as a loading report showing the condition of the fruit at the time of loading in addition to the extreme overly ripened condition of the fruit at the time of delivery in Mobile. In considering all of this evidence, the trial court concluded there was no inherent defect, quality, or vice in the bananas and this finding was held by the Appellate Court not to be clearly erroneous. *McAllister vs. United States,* supra. The Second Circuit Court of Appeals has reached the same result in *Elia Salzman Tobacco Co. vs. S. S. Mormacwind,* (2 Cir., 1967) 371 F. 2d 537. (See footnote 2 at p. 539.)

Finally, Petitioner says that the Court of Appeals erroneously reversed the District Court's judgment awarding Petitioner charter hire for the period of time following Voyage Number 1 in Mobile and subsequently in Puerto Bolivar. Such holding was not incorrect inasmuch as Clause

15 of the charter party expressly stated the charterer was not liable for time lost by reason of "deficiency of men." Since these delays or "off-hire" periods directly resulted from the damages cargo on Voyage 1 which was caused by reason of an "inadequate crew", the court below correctly held Respondents were not responsible for the loss of time.

II

There is no conflict of decision.

The Petitioner asserts there were four (4) instances wherein the decision reached in the Court below were in conflict with other Circuit Courts of Appeal. Specifically, these are:

A. The holding that a vessel is deemed unseaworthy at the start of the voyage unless the owner insures that adequate and competent personnel will remain on board throughout the voyage.

The Court of Appeals holding in this regard,while not the sole basis for holding the HEINZ HORN unseaworthy, is in accord with this Court's decision of *International Navigation Co. vs. Farr & Bailey Mfg. Co.*, 1901, 181 U.S. 218, 21 S. Ct. 591, 45 L. ed. 830,and *The Framlington Court*, (5 Cir., 1934) 69 F. 2d 300, cert. denied 282 U.S. 651, 54 S. Ct. 860, 78 L. ed. 1500, and is not in conflict with *Cullen Fuel Co. v. Hedger Co.*, 1933, 290 U.S. 82, S. Ct., 78 L. ed. 189, or with the other decisions cited by Petitioner. To again refer to the facts of this case,the Master did not become ill after the vessel went on charter as he had been ill for sometime prior to the vessel ever going on charter; the vessel did not carry her normal complement of officers; and the officers had no experience with boxed

bananas. These were not conditions beyond the owner's control which arose after the vessel commenced her voyage, but were in existence prior to and at the commencement of the voyage.

B. The holding that the vessel must bear the burden of proving absence of causation between the unseaworthiness and the loss.

Petitioner contends such holding conflicts with the Third Circuit Court of Appeals decision of *The Oritani,* 40 F. 2d 522, aff'd 54 F. 2d 1075 (3 Cir., 1931). As previously noted *The Oritani* is not applicable and it was decided prior to the enactment of the Carriage of Goods By Sea Act 46 U.S.C. 1300 et seq. which expressly places such burden of proof on the vessel. Consequently, the decision herein in following COGSA is not in conflict.

C. The holding of the court below that, under the facts; the shipowner was responsible for the faulty stowage and resulting loss of cargo.

Petitioner contends this holding conflicts with decisions in the Third and Second Circuit Courts of Appeals and is incompatible with this Court's decision of *Oxford Paper Co. vs. The Nidarholm,* 1931, 282 U.S. 681, 51 S. Ct. 266, 75 L. ed. 614. Actually, the decision here on petition is readily factually distinguishable from the cases cited by Petitioner and were expressly distinguished by the Court of Appeals below. The Appellate Court in fact cites *The Nidarholm* decision in support of its conclusion that under the particular facts presented in this case the shipowner was responsible for the faulty stowage and resulting loss. It is submitted that a distinction between facts of cases does not present a conflict such as would warrant a review by this Court on certiorari.

D. The conclusion that the Petitioner shipowner had the burden of proving inherent vice or defect in the cargo.

Petitioner argues that the conclusion by the Court of Appeals to the effect the vessel owner must bear the burden of proving inherent vice or defect in the cargo of stemmed bananas conflicts with decisions of the Second Circuit Court of Appeals and with decisions from various District Courts in the Fifth Circuit. This is simply not the case. The decisions to which Petitioner refers concerned cargo where deterioration may have resulted from a hidden defect which was not adequately revealed by external appearances; here, the cargo was stems of bananas which were easily observable. The decision of the Court below was grounded on considerable more evidence as to the condition of the cargo at the time of loading than a clean bill of lading. In addition, the Court made a positive finding of lack of due diligence on the part of the vessel's officers and crew in caring for the cargo. It is submitted the decisions referred to by Petitioner are not applicable to the facts here presented, and there is no conflict between those cases and the instant case.

III

There is no important question of Federal law.

The issues in this case involve only a factual situation pertaining to shipments of bananas under a charter party agreement which was applicable only to the particular parties thereto. The questions presented, while arising under admiralty and maritime law, are not of the significant importance which merit review by this Court.

CONCLUSION

The decision in the Court of Appeals primarily involved a determination of facts and does not present questions of general importance to the entire shipping and insurance communities. The charter party involved, although on a standard printed form, was extensively amended to conform to the purpose and intent of the parties, and the

conclusions of the Court of Appeals pertained to this particular charter party, as thus amended. This case does not give rise to a conflict of decisions, but rests solely on its own unique factual situation.

It is respectfully submitted that the questions here raised by Petitioner are not of such general importance or concern so as to warrant a review by this Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, T. K. JACKSON, JR., the attorney for the Respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14 day of March,1969, I served a copy of the foregoing brief for Respondents in opposition on Heinrich C. Horn, Petitioner herein, by mailing a copy of the same in a duly addressed envelope, with first class postage prepaid, to the Honorable John H. Tappan, attorney for the Petitioner, at his office address, 510 Van Antwerp Building, Mobile, Alabama 36601.

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